TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1257.

ELBEE PATCH, ADMINISTRATOR *DE BONIS NON* OF THE ESTATE OF CHARLES W. MASON, DECEASED, PLAINTIFF IN ERROR,

vs.

WABASH RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED JUNE 23, 1888.

(20,293.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 328.

ELBEE PATCH, ADMINISTRATOR *DE BONIS NON* OF THE ESTATE OF CHARLES W. MAXON, DECEASED, PLAINTIFF IN ERROR,

vs.

WABASH RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Southern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, plaintiff, and Wabash Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of June, in the year of our Lord one thousand nine hundred and six.

[The Seal of the Circuit Court of the United States, South. Dist. Ill.]

JAMES T. JONES,
Clerk of the Circuit of the United States
for the Southern Dist. of Illinois.

Allowed by
HUMPHREY, *D. J.*

Filed June 1st, 1906.
JAMES T. JONES, *Clerk.*

[Endorsed:] Supreme Court of the United States. Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, dec'd, *vs.* Wabash Railroad Company. Writ of Error. Copy deposited for the defendant in error in the Clerk's Office, U. S. Circuit Court, Southern District of Illinois.

2 Pleas in the Circuit Court of the United States of America for the Southern District of Illinois, Southern Division, held at the City of Springfield, in said District, before the Hon. J. Otis Humphrey, District Judge of said District, and in the absence of the Hon. Peter S. Grosscup, the Hon. Francis E. Baker, the Hon. Christian C. Kohlsaat, and the Hon. William H. Seaman, Judges of the Seventh Judicial Circuit, on Saturday, the 19th day of May, at the January term of said Court, in the year of our Lord one thousand nine hundred and six, and of our Independence the one hundred and thirtieth year.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased,

vs.

WABASH RAILROAD COMPANY.

Trespass.

Be it remembered that heretofore to-wit on the 24th day of October in the year of our Lord one thousand nine hundred and five came the Wabash Railroad Company by Messrs. C. N. Travous and McAnulty & Allen its attorneys and filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of Illinois Southern Division a certified record from the Circuit Court of Sangamon County Illinois in a certain suit wherein Elbee Patch, Administrator *de bonis non* of the estate of Charles W. Maxon, deceased, is plaintiff and the Wabash Railroad Company is defendant, which certified record is as follows, to-wit:

3 STATE OF ILLINOIS, *Sangamon County, ss:*

Pleas before the Hon. James A. Creighton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held at the Court House, in the City of Springfield, County and State aforesaid, on the first Monday (the same being the fourth day) of September, in the year of our Lord One Thousand Nine Hundred and five.

Present: Hon. James A. Creighton, Judge. Frank L. Hatch, State's Attorney. B. H. Brainerd, Sheriff. S. T. Jones, Clerk.

Be it remembered that on the 14th day of August, A. D. 1905, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain præcipe, which said præcipe is in the words and figures as follows, to-wit:

STATE OF ILLINOIS, *Sangamon County, ss:*

Circuit Court, September Term, A. D. 1905.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased,

vs.

WABASH RAILROAD COMPANY (a Corporation).

Action of Trespass on the Case. Damages, $10,000.00.

The Clerk will issue summons in the above entitled cause, directed to the Sheriff of said County, returnable to the September Term, A. D. 1905.

GEORGE C. OTTO,
Plaintiff's Attorney, 633 Marquette Bldg., Chicago.

Springfield, August 14, 1905.

4 And afterwards to-wit on the 14th day of August, A. D. 1905, there issued out of the office of the Clerk of said Sangamon County Circuit Court a certain summons, which said summons, together with the endorsements of the Sheriff thereon is in the words and figures as follows to-wit:

STATE OF ILLINOIS, *Sangamon County, ss:*

The People of the State of Illinois to the Sheriff of Sangamon County, Greeting:

We command you to summon Wabash Railroad Company, a corporation if to be found in your county, to appear before the Circuit Court of Sangamon County, on the first day of the next term thereof, to be holden at the Court House in the City of Springfield, on the first Monday in the month of September, A. D. 1905, to answer unto Elbee Patch, Administrator *de bonis non* of the estate of Charles W. Maxon, deceased, in a plea of trespass on the case, to the damage of said plaintiff, as it is said, in the sum of Ten Thousand Dollars and hereof make due return to our said Court as the law directs.

Witness S. T. Jones, Clerk of said Court and the Judicial Seal thereof, at Springfield, this 14 day of August, A. D. 1905.

[Circuit Court Seal.]

S. T. JONES, *Clerk.*

STATE OF ILLINOIS, *Sangamon County, ss:*

I have served the within writ on the within named Wabash Railroad Company a corporation by reading the within to G. W. Sargent, Freight Agent of Wabash Railroad Company a corporation and at the same time delivering to the said G. W. Sargent a true copy of the within writ, this 25th day of August, A. D. 1905. The presi-

dent of the Wabash Railroad Company, a corporation not found in my county.

B. H. BRAINERD, *Sheriff.*

5 And afterwards, to-wit on the 25th day of August, A. D. 1905, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain declaration, which said declaration is in the words and figures as follows, to-wit:

STATE OF ILLINOIS, *Sangamon County, ss:*

In the Circuit Court of Sangamon County, to the September Term, A. D. 1905.

Gen. No. —. Case. $10,000.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,

vs.

WABASH RAILROAD COMPANY, a Corporation, Defendant.

Elbee Patch, Administrator *de bonis non* of the estate of *the estate of* Charles W. Maxon, deceased, (who died intestate) plaintiff in this suit, by George C. Otto, and Shutt, Graham & Graham, his attorneys complains of Wabash Railroad Company, a corporation, defendant herein, summoned, etc., of a plea of trespass on the case.

1st. For that heretofore and in the lifetime of the said Charles W. Maxon, and on, to-wit, the sixth day of September, A. D. 1904, the said Wabash Railroad Company, defendant herein, was possessed of a certain railroad lying in part within the State of Illinois, including therein a certain railroad track lying wholly within the State of Illinois and extending within said State, among other places, from to-wit, the City of Springfield, in Sangamon County, through a part of said Sangamon County and, by way of the City of Decatur, in Macon County, and a place known as Brisbane, in Will County, and the Village of Marley, in Will County, to, to-

6 wit: the City of Chicago, in Cook County, together with certain locomotive engines and cars, thereon; and was then and there using and operating the same as a common carrier, for the transportation of passengers, chattels, goods and merchandise, for hire; and, said defendant was then and there using and operating, among others, two certain trains, each of which consisted of a number of cars with a locomotive engine attached to draw the same, and, was then and there transporting with each of said two trains, chattels, goods and merchandise along and over said railroad track, from, to-wit, said City of Decatur, toward and to, to-wit, said City of Chicago.

And said plaintiff avers that the said Charles W. Maxon was then and there in the employ of said defendant, in the capacity of a locomotive engineer; and; that it was then and there the duty of said Charles W. Maxon, as such employee of said defendant, to have

charge and control of and,—subject to such orders as he might receive from said defendant,—drive the locomotive-engine of one, of said two trains, along and over said railroad track from, to-wit, said City of Decatur, to, to-wit, said City of Chicago; and, that the said Charles W. Maxon did then and there take and have charge of and, subject to the orders received by him from said defendant, drive the locomotive-engine of one of said trains along and over said railroad track from, to-wit, said City of Decatur, to, to-wit: said Brisbane, on the said journey, and, at, to-wit, said Brisbane, was by said defendant ordered to, and did, then and there, stop and await orders there from said defendant, as to when to proceed:

And said plaintiff avers that the other of said two trains then included a considerable number of cars, to-wit, thirty-three cars, and was then on said railroad track at the railway station-house then maintained by said defendant at said Marley:

7 And said plaintiff avers that the distance between said two trains was then short, to-wit, four miles:

And said plaintiff avers that that part of said railroad track which lay between a point therein, situate near said station house, to-wit: where the forward end of said other train was, as aforesaid, and a point therein, situate a considerable distance, to-wit, two miles, from said Marley and toward said Brisbane, then inclined longitudinally downward, in the direction of said Brisbane to such degree that cars thereon, near said Marley and not under control would, especially when set in motion in that direction, run, from the force of gravity, toward said Brisbane for a great distance, to-wit, three miles:

And said plaintiff avers that a number of cars, to-wit, six cars, then and there detached from the rear end of said other train, and then and there ran back from said Marley and toward said Brisbane, on said railroad track, for a great distance, to-wit, three miles, and remained, then and there, on said railroad track, unattended, until the happening of the injuries herein complained of.

And said plaintiff avers that said defendant then and there knew, or in the exercise of ordinary and reasonable care would have known, that said cars from said other train had become detached and run back, uncontrolled, on and along said railroad track; and said plaintiff avers that said Charles W. Maxon did not know those facts, and had no notice thereof, until the happening of the injuries herein complained of.

And said plaintiff avers that said defendant had theretofore promulgated and established, and then and there had in effect, certain rules for the operation of the trains on said railroad track, and, that under said rules, an order from said defendant to said Charles W. Maxon to drive the locomotive-engine so under his charge and control, with the cars thereto attached, along and over said rail-

8 road track from said Brisbane to said Marley, then meant, among other things, that said railroad track from said Brisbane to the station-house then maintained by said defendant at said Marley was then clear and free from other trains and cars, unless such order was accompanied by a warning to proceed with caution;

And said plaintiff avers that said defendant, by certain its then

servants, who then and there were not fellow servants of said Charles W. Maxon, then and there to-wit: on the date aforesaid, and at, to wit, said Brisbane, and after said cars had been detached and had started back as aforesaid, carelessly and negligently ordered said Charles W. Maxon to drive the locomotive-engine so under his charge and control, with the cars thereto attached, forward, then and there, on and along said railroad track from said Brisbane to said Marley; and said plaintiff avers that said order was not accompanied by a warning to proceed with caution.

And said plaintiff avers that said Charles W. Maxon, then and there relied upon the information so received from said defendant, and did then and there, in compliance with the said order, drive the locomotive-engine so under his charge and control, with the cars thereto attached, at great speed, on and along said railroad track from said Brisbane and toward said Marley, for the distance of, to-wit: three miles:

And said plaintiff avers that while the said Charles W. Maxon, who was then and there in the exercise of all due and proper care and caution on his part for his own safety, was driving the said locomotive-engine so under his charge and control, with the cars thereto attached, at great speed, then and there, on and along said railroad track from said Brisbane and toward said Marley, as aforesaid, the said locomotive engine so under the charge and control of said Charles W. Maxon, with the cars thereto attached, then and there, to-wit, on the day aforesaid and on said railroad track between said Brisbane and said Marley, and in the County of Will and
9 State of Illinois, by reason of the aforesaid carelessness and negligence of said defendant, collided with, and struck with great force and violence against the said cars from the said other train; and said plaintiff avers that by reason thereof said Charles W. Maxon was then and there struck and caught by the wreckage of said cars and train, and thereby then and there so crushed, bruised, hurt and injured that his death ensued therefrom; and, that the said Charles W. Maxon, by reason of being crushed, bruised, hurt and injured as aforesaid, did, then and there, to-wit, on the date aforesaid, and in the County of Will and State of Illinois, die:

And said plaintiff avers that the said Charles W. Maxon left him surviving Ida May Maxon, his widow, Hubert Maxon, his son, and Harry Maxon, his son, his next of kin, all three of whom are still living; and said plaintiff avers that, by reason of the death of the said Charles W. Maxon, as aforesaid, the said Ida May Maxon, and Hubert Maxon, and Harry Maxon, have suffered pecuniary injury and loss:

2nd. And for that heretofore and in the lifetime of said Charles W. Maxon, and on, to-wit, the sixth day of September, A. D. 1904, the said Wabash Railroad Company, defendant herein, was possessed of a certain railroad lying in part within the State of Illinois, including therein a certain railroad track lying wholly within the State of Illinois and extending within said State, among other places, from, to-wit, the City of Springfield, in Sangamon County, through a part of said Sangamon County and, by way of the City of Decatur,

in Macon County, and a place known as Brisbane, in Will County, and the Village of Marley, in Will County, to, to-wit, the City of Chicago, in Cook County,—together with certain locomotive-engines and cars, thereon; and, was then and there using and operating the same as a common carrier, for the transportation of passengers, chattels, goods and merchandise, for hire; and, said defendant was then and there using and operating, among other, two certain
10 trains,—each of which consisted of a number of cars with a locomotive-engine attached to draw the same,—and, was then and there transporting with each of said two trains, chattels, goods and merchandise along and over said railroad track, from, to-wit: said city of Decatur, toward and to, to-wit, said city of Chicago.

And said plaintiff avers that the said Charles W. Maxon was then and there in the employ of said defendant in the capacity of a locomotive-engineer, and, that it was then and there the duty of said Charles W. Maxon, as such employee of said defendant, to have charge and control of and,—subject to such orders as he might receive from said defendant,—drive the locomotive-engine of one, of said two trains, along and over said railroad track from, to-wit: said City of Decatur, to, to-wit: said city of Chicago, and, that the said Charles W. Maxon did then and there take and have charge of and, subject to the orders received by him from said defendant, drive the locomotive-engine of one of said two trains along and over said railroad track from, to-wit, said city of Decatur, to, to-wit, said Brisbane, on the said journey, and at, to-wit, said Brisbane, was by said defendant ordered to, and did, then and there, stop and await orders there from said defendant, as to when to proceed:

And said plaintiff avers that the other of said two trains, then included a considerable number of cars, to-wit, thirty-three cars, and was then on said railroad track at the railway station-house then maintained by said defendant at said Marley:

And said plaintiff avers that the distance between said two trains was then short, to-wit, four miles:

And said plaintiff avers that that part of said railroad track which lay between a point therein, situate near said station-house, to-wit, where the forward end of said other train then was, as aforesaid, and a point therein, situate a considerable distance, to-wit, two miles, from said Marley and toward said Brisbane, then inclined longitudinally downward, in the direction of said Brisbane, to
11 such degree that cars thereon near said Marley and not under control would, especially when set in motion in that direction, run, from the force of gravity, toward said Brisbane for a great distance, to-wit, three miles:

And said plaintiff avers that said defendant had heretofore promulgated and established, and then and there had in effect, certain rules for the operation of the trains on said railroad track; and, that under said rules, an order from said defendant to said Charles W. Maxon to drive the locomotive-engine so under his charge and control, with the cars thereto attached, along and over said railroad track from said Brisbane to said Marley, then meant, among other

things, that said railroad track from said Brisbane to the station-house then maintained by said defendant at said Marley as aforesaid, was then clear and free from other trains and cars, unless such order was accompanied by a warning to proceed with caution:

And said plaintiff avers that said defendant, by certain its then servants, who then and there were not fellow servants of said Charles W. Maxon, then and there, to-wit: on the date aforesaid, and at, to-wit said Brisbane, carelessly and negligently ordered said Charles W. Maxon to drive the locomotive-engine so under his charge and control, with the cars thereto attached, forward, then and there, on and along said railroad track from said Brisbane to said Marley; and said plaintiff avers that said order was not accompanied by a warning to proceed with caution:

And said plaintiff avers that said railroad track, from said Brisbane, to said station-house, was not then clear and free from other trains and cars; but, that a large number, to-wit, six cars in said other train then were, and until after the happening of the injuries herein complained of remained, on said railroad track between said Brisbane and said station-house:

12 And said plaintiff avers that said defendant knew, or in the exercise of ordinary and reasonable care would have known, when said order was given, that said cars in said other train were still on said railroad track between said Brisbane and said station-house; and, that said Charles W. Maxon did not know that fact, and had no notice thereof, until the happening of the injuries herein complained of:

And said plaintiff avers that said Charles W. Maxon then and there relied upon the information so received by him from said defendant, and that while said cars in said other train were on said railroad track between said Brisbane and said station-house as aforesaid the said Charles W. Maxon did, in compliance with the said order, drive the locomotive-engine so under his charge and control, with the cars thereto attached, forward, at great speed, on and along said railroad track from said Brisbane and toward said Marley, for a great distance, to-wit, three miles:

And said plaintiff avers that said defendant, by certain its then servants, who then and there were not fellow servants of said Charles W. Maxon, then and there, and until after the happening of the injuries herein complained of, carelessly and negligently left the rear portion of said other train, on said railroal track uncontrolled and without anyone in position to control the same:

And said plaintiff avers that said defendant carelessly and negligently then and there had and retained in use and relied upon, to hold two certain cars in the rear portion of said other train to each other, a certain metal device, known as a coupler, which then was, and for a long period of time, to-wit, one week, theretofore had been in such bad order as to be unsafe for that use,—in that a certain metal projection therein, known as the tongue thereof, and provided, and then and there used to hold said coupler shut, to the end of keeping the said two cars together, was cracked, crosswise, for to-wit, one-fourth of the distance through the same.

And said plaintiff avers that said defendant then and there
13 knew, or in the exercise of ordinary and reasonable care would have known, of the said bad order of said coupler, and, that said Charles W. Maxon did not know of the said bad order of said coupler, and had no notice thereof.

And said plaintiff avers that, while said rear portion of said other train was on said railroad track between said Brisbane and said station-house and uncontrolled and without anyone in position to control the same, as aforesaid, said defendant, by certain its then servants, who then and there were not fellow servants of said Charles W. Maxon, carelessly and negligently moved said other train backward a short distance, violently, and then applied air brakes suddenly and with great force on the forward part of said other train:

And said plaintiff avers that, by reason thereof, and then and there, the said coupler broke and opened, and the said two cars were thereby detached and separated.

And said plaintiff avers that the rear one of said two cars, together with the cars behind it in said other train, several in number, to-wit, six in all, by reason of being detached and uncontrolled and without anyone in position to control them, then and there ran unattended back on and along said railroad track toward said Brisbane, for a great distance, to-wit: three miles:

And said plaintiff avers that while the said Charles W. Maxon, who was then and there in the exercise of all due and proper care and caution on his part for his own safety, *was* driving the said locomotive-engine so under his charge and control, with the cars thereto attached, at great speed, then and there, on and along said railroad track from said Brisbane and toward said Marley, as aforesaid, the said locomotive-engine so under the charge and control of said Charles W. Maxon, with the cars thereto attached, then and there, to-wit, on the date aforesaid, and on said railroad track
14 between said Brisbane and said Marley, and in the County of Will and State of Illinois, by reason of the aforesaid carelessness and negligence of said defendant, collided with, and struck with great force and violence against the said cars from the rear portion of said other train; and said plaintiff avers that by reason thereof said Charles W. Maxon was then and there struck and caught by the wreckage of said cars and train, and thereby then and there so crushed, bruised, hurt and injured that his death ensued therefrom; and, that the said Charles W. Maxon, by reason of being crushed, hurt, bruised and injured as aforesaid, did, then and there, to-wit; on the date aforesaid, and in the County of Will and State of Illinois, die:

And said plaintiff avers that the said Charles W. Maxon left him surviving Ida May Maxon, his widow, Hubert Maxon, his son, and Harry Maxon, his son, his next of kin, all three of whom are still living; and said plaintiff avers that, by reason of the death of the said Charles W. Maxon, as aforesaid, the said Ida May Maxon, and Hubert Maxon, and Harry Maxon, have suffered pecuniary injury and loss:

3rd. And for that heretofore and in the lifetime of said Charles

W. Maxon, and on, to-wit, the sixth day of September, A. D. 1904, the said Wabash Railroad Company, defendant herein, was possessed of a certain railroad lying in part within the State of Illinois, including therein a certain railroad track lying wholly within the State of Illinois and extending within said State, among other places, from to-wit, the City of Springfield, in Sangamon County, through a part of said Sangamon County and, by way of the City of Decatur, in Macon County, and a place known as Brisbane, in Will County, and the Village of Marley, in Will County, to, to-wit: the City of Chicago, in Cook County,—together with certain
15 locomotive-engines and cars, thereon; and, was then and there using and operating the same as a common carrier, for the transportation of passengers, chattels, goods and merchandise, for hire; and, said defendant was then and there using and operating, among others, two certain trains,—each of which consisted of a number of cars with a locomotive-engine attached to draw the same,—and, was then and there transporting with each of said two trains, chattels, goods and merchandise along and over said railroad track, from, to-wit, said City of Decatur, toward and to, to-wit, said City of Chicago.

And said plaintiff avers that the said Charles W. Maxon was then and there in the employ of said defendant, in the capacity of a locomotive-engineer; and, that it was then and there the duty of said Charles W. Maxon, as such employee of said defendant to have charge and control of and,—subject to such orders as he might receive from said defendant,—drive the locomotive-engine of one, of said two trains, along and over said railroad track from, to-wit: said city of Decatur, to, to-wit, said City of Chicago; and, that the said Charles W. Maxon did then and there take and have charge of and, subject to the orders received by him from said defendant, drive the locomotive-engine of one of said two trains along and over said railroad track from, to-wit: said City of Decatur, to, to-wit: said Brisbane on the said journey, and, at, to-wit, said Brisbane, was by said defendant ordered to, and did, then and there, stop and await orders there from said defendant, as to when to proceed:

And said plaintiff avers that the other of said two trains, then included a considerable number of cars, to-wit, thirty-three cars, and was then on said railroad track at the railway station-house then maintained by said defendant at said Marley:

And said plaintiff avers that the distance between said two trains was then short, to-wit, four miles:

16 And said plaintiff avers that that part of said railroad track which lay between a point therein, situate near said station-house, to-wit, where the forward end of said other train then was, as aforesaid, and a point therein, situate a considerable distance, to-wit: two miles, from said Marley and toward said Brisbane, then inclined longitudinally downward, in the direction of said Brisbane, to such degree that cars thereon near said Marley and not under control would, especially when set in motion in that direction, run, from the force of gravity, toward said Brisbane for a great distance, to-wit: three miles.

And said plaintiff avers that said defendant carelessly and negligently then and there had and retained in use and relied upon, to hold two certain cars in the rear portion of said other train to each other, a certain metal device, known as a coupler, which then was, and for a long period of time, to-wit, one week, theretofore had been in such bad order as to be unsafe for that use,—in that a certain metal projection therein, known as the tongue thereof, and provided and then and there used to hold said coupler shut, to the end of keeping the said two cars together, was cracked, crosswise, for, to-wit: one-fourth of the distance through the same:

And said plaintiff avers that said defendant then and there knew, or in the exercise of ordinary and reasonable care would have known, of the said bad order of said coupler, and, that said Charles W. Maxon did not know of the said bad order of said coupler, and had no notice thereof.

And said plaintiff avers that said defendant, by certain its then servants, who then and there were not fellow servants of said Charles W. Maxon, then and there, and until after the happening of the injuries herein complained of, carelessly and negligently left the rear portion of said other train, on said railroad track, uncontrolled, and without anyone in position to control the same.

17 And the said plaintiff avers that said defendant then had and retained in its employ, and then and there carelessly and negligently permitted to have charge and control of, and drive, the locomotive-engine of said other train, a certain its then servant, who then and there was incompetent to have charge and control of, and drive, said locomotive-engine of said other train, in that he was not possessed of sufficient skill as a locomotive-engineer to enable him to operate the locomotive-engine of said other train properly and safely:

And said plaintiff avers that said defendant then and there knew, or in the exercise of ordinary and reasonable care would have known, that said servant so in charge of said locomotive-engine of said other train was incompetent, as aforesaid; and, that said Charles W. Maxon did not know those facts, and had no notice thereof.

And said plaintiff avers that while said rear portion of said other train was on said railroad track between said Brisbane and said station-house and uncontrolled and without any one in position to control the same, as aforesaid, said incompetent servant attempted to operate the said locomotive-engine of said other train, and, by reason of want of skill, as aforesaid, then and there, improperly operated said locomotive-engine of said other train, and thereby improperly moved said other train.

And said plaintiff avers that, by reason thereof, and then and there, the said coupler broke, and the said two cars were thereby detached and separated:

And said plaintiff avers that the rear one of said two cars, together with the cars behind it in said other train, several in number, to-wit, six in all, by reason of being detached and uncontrolled and without anyone in position to control them, then and there ran unattended back on and along said railroad track toward said Brisbane, for a great distance, to-wit: three miles.

18 And said plaintiff avers that said defendant had heretofore promulgated and established, and then and there had in effect, certain rules for the operation of the trains on said railroad track; and, that under said rules, an order from said defendant to said Charles W. Maxon to drive the locomotive-engine so under his charge and control, with the cars thereto attached, along and over said railroad track from said Brisbane to said Marley, then meant, among other things, that said railroad track from said Brisbane to the station-house then maintained by said defendant at said Marley as aforesaid, was then clear and free from other trains and cars, unless such order was accompanied by a warning to proceed with cauiton.

And said plaintiff avers that said defendant, by certain its then servants, who then and there were not fellow servants of said Charles W. Maxon, then and there, to-wit, on the date aforesaid, and at, to-wit, said Brisbane, carelessly and negligently ordered said Charles W. Maxon to drive the said locomotive-engine so under his charge and control, with the cars thereto attached, forward, then and there, on and along said railroad from said Brisbane to said Marley; and said plaintiff avers that said order was not accompanied by a warning to proceed with caution.

And said plaintiff avers that said railroad track, from said Brisbane to said station-house, was not clear and free from other trains and cars, but, that a large number of cars, to wit, six cars, from said other train, were then on said railroad track between said Brisbane and said station-house, and, until after the happening of the injuries herein complained of, remained on said railroad track, between said Brisbane and said station-house.

19 And said plaintiff avers that said defendant knew, or in the exercise of ordinary and reasonable care would have known, when said order was given, that said cars from said other train were still on said railroad track between said Brisbane and said station-house; and, that said Charles W. Maxon did not know that fact, and had no notice thereof, until the happening of the injuries herein complained of;

And said plaintiff avers that said Charles W. Maxon then and there relied upon the information so received by him from said defendant, and, that while said cars from said other train were still on said railroad track between said Brisbane and said station-house, the said Charles W. Maxon did, in compliance with the said order, drive the locomotive-engine so under his charge and control, with the cars thereto attached, forward, at great speed, on and along said railroad track from said Brisbane and toward said Marley, for a great distance, to-wit, three miles.

And said plaintiff avers that while the said Charles W. Maxon, who was then and there in the exercise of all due and proper care and caution on his part for his own safety, was driving the said locomotive-engine so under his charge and control, with the cars thereto attached, at great speed, then and there, on and along said railroad track from said Brisbane and toward said Marley, as aforesaid, the said locomotive engine so under the charge and control of said

Charles W. Maxon, with the cars thereto attached, then and there, to-wit, on the date aforesaid, and on said railroad track between said Brisbane and said Marley, and in the County of Will and State of Illinois, by reason of the aforesaid carelessness and negligence of said defendant, collided with, and struck with great force and violence against the said cars from said other train; and said plaintiff avers that by reason thereof the said Charles W. Maxon was then and there struck and caught by the wreckage of said cars and
20 locomotive-engine, and thereby then and there so crushed, bruised, hurt and injured that his death ensured therefrom; and said plaintiff avers that said Charles W. Maxon, by reason of being crushed, hurt, bruised and injured as aforesaid, did, then and there, to-wit, on the day aforesaid, and in the County of Will and State of Illinois, die;

And said plaintiff avers that the said Charles W. Maxon left him surviving Ida May Maxon, his widow, Hubert Maxon, his son, and Harry Maxon, his son, his next of kin, all three of whom are still living; And said plaintiff avers that, by reason of the death of the said Charles W. Maxon, as aforesaid, the said Ida May Maxon, and Hubert Maxon and Harry Maxon, have suffered pecuniary injury and loss:

4th. And for that heretofore and in the life time of the said Charles W. Maxon, and on, to-wit, the sixth day of September, A. D. 1904, the said Wabash Railroad Company, defendant herein, was possessed of a certain railroad lying in part within the State of Illinois, including therein a certain railroad track lying wholly within the State of Illinois and extending within said State, among other places, from to wit, the City of Springfield in Sangamon County, through a part of said Sangamon County and, by way of the City of Decatur, in Macon County, and place known as Brisbane, in Will County, and the village of Marley, in Will County, to, to-wit: the City of Chicago, in Cook County, together with certain locomotive-engines and cars, thereon; and, was then and there using and operating the same as a common carrier, for the transportation of passengers, chattels, goods and merchandise, for hire; and, said defendant was then and there using and operating, among others, two certain trains,—each of which consisted of a number of cars with a locomotive-engine attached to draw the same, and was then and there transporting with each of said trains chattels, goods and
21 merchandise along and over said railroad track, from to-wit: said city of Decatur, to, to-wit: said City of Chicago.

And said plaintiff avers that said Charles W. Maxon was then and there in the employ of said defendant, in the capacity of a locomotive-engineer; and, that it was then and there the duty of said Charles W. Maxon, as such employe of said defendant, to have charge and control of and,—subject to such orders as he might receive from said defendant,—drive the locomotive-engine of one of said two trains, along and over said railroad track from, to-wit, said city of Decatur, to, to-wit: said city of Chicago; and, that the said Charles W. Maxon did then and there take and have charge and control of and, subject to the orders received by him from said de-

fendant, drive the locomotive-engine of one of said trains along and over said railroad track from, to-wit: said City of Decatur, to, to-wit, said Brisbane, on the said journey, and, at to-wit, said Brisbane was by said defendant ordered to, and did, then and there, stop and await orders there from said defendant, as to when to proceed:

And said plaintiff avers that said defendant then and there ordered the said Charles W. Maxon to drive the said locomotive-engine so under his charge and control with the cars thereto attached, forward then and there, on and along said railroad track from said Brisbane to said Marley.

And said plaintiff avers that said Charles W. Maxon did then and there, in compliance with the said order, drive the locomotive-engine so under his charge and control, with the cars thereto attached, on and along said railroad track from said Brisbane and toward said Marley for the distance of, to-wit, three miles.

And said plaintiff avers that said defendant carelessly and negligently suffered and allowed certain railway cars to be and remain then and there on said railroad track between said Brisbane
22 and said Marley and said plaintiff avers that said defendant then and there knew, or in the exercise of ordinary and reasonable care would have known, that said railway cars were so on said railroad track, and, that said Charles W. Maxon did not know that fact, and had no notice thereof, until the happening of the injuries herein complained of.

And said plaintiff avers that while the said Charles W. Maxon, who was then and there in the exercise of all due and proper care and caution on his part for his own safety, was driving the said locomotive-engine so under his charge and control, with the cars thereto attached, at great speed, then and there, on and along said railroad track from said Brisbane and toward said Marley, as aforesaid, the said locomotive-engine so under the charge and control of said Charles W. Maxon, with the cars thereto attached, then and there, to-wit, on the day aforesaid and on said railroad track between said Brisbane and said Marley, and in the County of Will and State of Illinois, by reason of the aforesaid carelessness and negligence of said defendant, collided with, and struck with great force and violence against the said cars so upon the said railroad track; and said plaintiff avers that by reason thereof said Charles W. Maxon was struck and caught by the wreckage of said cars and train, and thereby then and there so crushed, bruised, hurt and injured that his death ensued therefrom; and, that the said Charles W. Maxon, by reason of being crushed, bruised, hurt and injured as aforesaid, did, then and there, to-wit: on the day aforesaid, and in the County of Will and State of Illinois, die.

And said plaintiff avers that said Charles W. Maxon left him surviving Ida May Maxon, his widow, and Hubert Maxon, his son, and Harry Maxon his son, his next of kin, all three of whom are still living; and said plaintiff avers that, by reason of the death of the said Charles W. Maxon, as aforesaid, the said Ida May Maxon
23 and Hubert Maxon, and Harry Maxon, have suffered pecuniary injury and loss;

To the damage of said plaintiff, as administrator *de bonis non*, as aforesaid, in the sum of Ten Thousand Dollars, and therefore he brings his suit, etc.,

And the said plaintiff brings into Court here the letters of administration *de bonis non* to him granted by the Probate Court of Cook County, Illinois, which give sufficient evidence to the Court here of the grant of administration *de bonis non* of said estate to the said plaintiff.

GEORGE C. OTTO,
SHUTT, GRAHAM & GRAHAM,
Attorneys for said Plaintiff.

And afterwards, to-wit on the 6th day of September, A. D. 1905, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain petition and bond for removal to Federal Court, which said petition and bond is in the words and figures as follows to-wit:

STATE OF ILLINOIS, *Sangamon County, ss:*

In the Circuit Court, September Term, A. D. 1905.

Case. $10,000.00.

ELBEE PATCH, Adm'r *d. b. n* Est. Charles W. Maxon, Dec'd.
vs.
24 THE WABASH RAILROAD COMPANY, a Corporation.

Petition for the Removal of the Above-entitled Cause to the United States Circuit Court for the Southern District of Illinois.

To the Honorable the Presiding Judge of the Circuit Court of Sangamon County, State of Illinois:

Your petition- respectfully shows that it is defendant in the above entitled cause, and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of $2,000.00.

Your petitioner further shows that said suit is of a civil nature, and is a controversy wholly between citizens of different states, to-wit: between this petitioner, who avers that it was at the time of the commencement of said suit, and still is, a corporation created and organized by and under the laws of the State of Ohio, and was at the time of the commencement of said suit, and still is, a citizen of said State of Ohio, and was at the time of the commencement of said suit, and still is a non-resident of the State of Illinois, and the said plaintiff, who was at the time of the commencement of said suit, and still is, a citizen and resident of the State of Illinois.

That said controversy is of the following nature, to-wit: a civil action for damages for the death of Charles W. Maxon, while in defendant's employ as a locomotive-engineer, on or about September 6, 1904, near Marley, Ill., said to have been caused by collision with

certain cars on defendant's track and the question is as to the liability of the petitioner for said death, and that the plaintiff and your petitioner are actually interested in said controversy.

25 And your petitioner offers herewith a bond with good and sufficient surety, for its entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said Circuit Court of the United States, in and for the Southern District of Illinois.

And it will ever pray, etc.

WABASH RAILROAD COMPANY,
By C. N. TRAVOUS AND
McANULTY & ALLEN,
Attorneys for Petitioner.

STATE OF MISSOURI, *City of St. Louis, ss:*

I, C. N. Travous, being duly sworn, do say that I am one of the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

C. N. TRAVOUS.

Subscribed in my presence, and sworn to before me this 1st day of September, A. D. 1905, and I certify that I am authorized to administer oaths, and that my commission expires June 18, 1907.

HANNAH BADGLEY,
[NOTARIAL SEAL.] *Notary Public.*

26 *Removal Bond.*

Know all men by these presents, that we, the Wabash Railroad Company, as principal, and B. R. Hieronymus, as surety, are held and firmly bound unto Elbee Patch, Administrator of the estate of Charles W. Maxon, dec'd in the penal sum of Five Hundred Dollars for the payment of which, well and truly to be made, we bind ourselves, our successors, representatives, heirs and assigns, jointly and severally, firmly by these presents.

Yet under these conditions: The said Wabash Railroad Company having petitioned the Circuit Court of Sangamon County, State of Illinois, for the removal of a certain cause therein pending, wherein said Elbee Patch, Adm'r, etc., is plaintiff and the said Wabash Railroad Company is defendant, to the Circuit Court of the United States, in and for the Southern District of Illinois:

Now, if the said Wabash Railroad Company, the petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 1st day of September, A. D. 1905.

WABASH RAILROAD COMPANY,
By E. B. PIZOR,
Assistant to President.

Attest:

E. B. PIZOR,
Assistant Secretary.

B. R. HIERONYMUS. [SEAL.]

[CORPORATE SEAL.]

27 STATE OF ILLINOIS, *County of Sangamon, ss:*

I, B. R. Hieronymus, of said County and State, and surety named in the foregoing bond, being duly sworn, do depose and say, that I am a resident of the said County, and State of Illinois, and a property holder therein; that I am worth the sum of Five Thousand Dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution, and that I have property in the said County of Sangamon and State of Illinois, liable to execution, of the value of more than One Thousand Dollars.

B. R. HIERONYMUS.

Subscribed and sworn to before me this 6th day of Sept., A. D. 1905.

JOHN HARTMAN,
Notary Public.

My commission expires Jan. 19, 1909.

[NOTARIAL SEAL.]

And afterwards to-wit on the 18th day of September, A. D. 1905, there was filed in the office of the Clerk of said Sangamon County Circuit Court a certain order for removal, which said order is in the words and figures as follows to-wit:

STATE OF ILLINOIS, *County of Sangamon:*

In the Sangamon County, Circuit Court, September Term, A. D. 1905.

28 ELBEE PATCH, Adm'r, etc., Charles W. Maxon,
vs.
WABASH RAILROAD COMPANY.

This cause coming on for hearing upon application of the defendant herein for an order transferring this cause to the United States Circuit Court for the Southern District of Illinois, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law and it appearing to the Court that this is a proper cause for removal to said Circuit Court.

Now therefore it is ordered and adjudged that this cause be and it hereby is removed to the United States Circuit Court for the Southern District of Illinois and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open Court this 18th day of September, A. D. 1905.

JAMES A. CREIGHTON, *Judge.*

And afterwards to-wit on the 18th day of September, A. D. 1905, the same being one of the term days of the September Term, A. D. 1905, of said Sangamon County Circuit Court, the following among other proceedings was had and entered of record as follows, to-wit:

29 ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,
vs.
WABASH RAILROAD COMPANY, a Corporation, Defendant.

Trespass on the Case.

And now come the parties hereto by their respective attorneys and now this cause coming on to be heard in open Court upon the petition of the defendant for a removal of this cause to the Federal Court, and the Court having heard the evidence and the arguments of counsel thereon and being sufficiently advised, grants the prayer of the said petition.

And it is ordered by the Court that this cause be removed to the Federal Court.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,

vs.

WABASH RAILROAD COMPANY, a Corporation, Defendant.

Trespass on the Case.

This cause coming on for hearing upon application of the defendant herein for an order transferring this cause to the United States Circuit Court for the Southern District of Illinois, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned with good and sufficient sureties as
30 provided by law and it appearing to the Court that this is a proper cause for removal to said Circuit Court.

Now therefore it is ordered and adjudged that this cause be and it hereby is removed to the United States Circuit Court for the Southern District of Illinois and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open Court this 18th day of September, A. D. 1905.

JAMES A. CREIGHTON, *Judge.*

STATE OF ILLINOIS, *Sangamon County, ss:*

I, S. T. Jones, Clerk of the Circuit Court within and for the County of Sangamon, in the State of Illinois, and keeper of the records and seal of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the convening order of said Court for the September Term, A. D. 1905; also for all papers filed and the orders and proceedings in a certain cause then pending in said Court on the law side thereof, wherein Elbee Patch, Administrator *de bonis non* of the estate of Charles W. Maxon, deceased, was Plaintiff and The Wabash Railroad Company was Defendant (a corporation) as the same appear from the records and files of said Court in my office remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield, this 28th day of September, A. D. 1905.

[L. S.] S. T. JONES, *Clerk.*

(Indorsed:) Filed October 24, 1905. James T. Jones, Clerk.

31 Then afterwards, to-wit, on the 30th day of December, in the year last aforesaid came again the plaintiff by his attorneys and filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of Illinois his plea in abatement in said case as follows, to-wit:

In the Circuit Court of the United States in and for the Seventh Circuit, Southern District of Illinois.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,

v.

WABASH RAILROAD COMPANY, (a Corporation), Defendant.

Trespass on the Case. $10,000.00.

And the said plaintiff, Elbee Patch, Administrator *de bonis non* of the estate of Charles W. Maxon, deceased, in his own proper person comes and defends against said defendant's petition for removal of this action from the Circuit Court of Sangamon County, Illinois, to this Court; and says, that before and at the time of the commencement of this action said defendant was a railroad corporation, created under and by virtue of the laws of the States of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other railroad corporations; and, that one of said other corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, one was a corporation created, organized and existing under and by virtue of the laws of the State of Missouri one was a corporation created, organized and existing under and by virtue of the laws of the State of Indiana, one was a corporation created, organized and existing under and by virtue of the laws of the State of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the State of Ohio; that said consolidation was effected, and said defendant corporation was organized, and before and at the time of the commencement of this action, existed, under and
32 by virtue of the laws of the State of Illinois and the laws of each of said four other States; and, that before and at the time of the commencement of this action, said defendant was, and still is, a citizen of, and resident in, the State of Illinois, and each of said four other States; and, that before and at the time of the commencement of this action, this plaintiff was, and still is, a citizen of the State of Ohio; and this he is ready to verify; wherefore he prays judgment whether this Court will or can take cognizance of this action.

ELBEE PATCH,
Administrator de bonis non of the Estate of Charles W. Maxon, Deceased, Plaintiff.

GEORGE C. OTTO,
Attorney for Plaintiff.

STATE OF OHIO, *County of Fayette, ss:*

Elbee Patch, being first duly sworn, deposes and says, that the foregoing plea by him subscribed as Administrator *de bonis non* of the estate of Charles W. Maxon, deceased, is true in substance and in fact; and further deponent saith not.

ELBEE PATCH.

Subscribed and sworn to before me, a notary public, in and for the County and State aforesaid, this 27th day of Dec., A. D. 1905.

[SEAL.] H. W. JONES,
Notary Public.

My commission expires Oct. 20, 1907.

(Indorsed:) Filed December 30, 1905. James T. Jones, Clerk.

Then afterwards, to-wit on the 8th day of January in the year of our Lord, 1906, came the defendant by its attorneys and filed in the Clerk's office of said Court its plea in said case as follows, to-wit:

33 In the Circuit Court of the United States for the Southern District of Illinois.

ELBEE PATCH, Administrator of Maxon, Deceased,
vs.
WABASH RAILROAD COMPANY.

Trespass on the Case.

And the defendant, by McAnulty & Allen, its attorneys, comes and defends the wrong and injuiry, when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against it; And of this the defendant puts itself upon the country, etc.

THE WABASH RAILROAD COMPANY,
By McANULTY & ALLEN, *Its Attorneys.*

(Indorsed:) Filed January 8, 1906. James T. Jones, Clerk

And afterwards, to-wit on the 27th day of January in the January term of said Court in the year last aforesaid the following further proceedings were had in said Court in said case, to-wit:

ELBEE PATCH, Adm'r, etc.,
vs.
WABASH RAILROAD COMPANY.

Trespass.

On motion of plaintiff by his attorneys the defendant is ruled to reply to plaintiff's plea in abatement in ten days.

Then afterwards, to-wit on the 6th day of February in the year last aforesaid came again the defendant by its attorneys and filed in the Clerk's office of said Court its General and special demurrer to plea to petition for removal as follows, to-wit:

34 In the Circuit Court of the United States for the Southern District of Illinois

WABASH RAILROAD COMPANY
ats.
ELBEE PATCH, Adm'r, etc.

Case.

And the defendant by McAnulty & Allen, its attorneys, says that the plea of the plaintiff to the defendant's petition for the removal of this cause to the Circuit Court of the United States for the Southern District of Illinois and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to be replied unto and that it, the defendant, is not bound by law to answer the same; and this it is ready to verify; wherefore for want of a sufficient plea in this behalf the defendant prays judgment, etc.

McANULTY & ALLEN,
Attorneys for Defendant.

And for special cause of demurrer the defendant shows unto the Court here the following causes, to-wit, for that said plea is not responsive to the averments contained in the defendant's petition for removal and neither traverses nor confesses and avoids the same, and for that said plea contains allegations wholly foreign to the issue tendered by said petition for removal and not responsive thereto, said allegations being as follows:

"That before and at the time of the commencement of this action said defendant was a railroad corporation, created under and by virtue of the laws of the States of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other railroad corporations; and, that one of said other corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, one was a corporation created, organized and existing under and by virtue of the laws of the State of Missouri, one was a corporation created, organized and ex-

35 isting under and by virtue of the laws of the State of Indiana, one was a corporation created, organized and existing under and by virtue of the laws of the State of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the State of Ohio; that said consolidation was effected and said defendant corporation was organized, and before and at the time of the commencement of this action, existed, under and by virtue of the laws of the State of Illinois and the laws of each of said four other states; and, that before and at the time of the commencement of this action, said defendant was, and still is, a citizen of, and resident in, the State of Illinois, and each of said four other States;" And for that said plea is in other respects both in form and substance, uncertain, informal and insufficient, etc.

McANULTY & ALLEN,
Attorneys for Defendant.

(Indorsed:) Filed February 6, 1906. James T. Jones, Clerk.

And afterwards, to-wit, on the 3rd day of March in the year of our Lord one thousand nine hundred and six at the January term of said Court the following further proceedings were had in said Court in said case and entered of record, to-wit:

ELBEE PATCH, Administrator of Estate of Charles W. Maxon, Deceased,
vs.
WABASH RAILROAD COMPANY.

Trespass.

This day this case came on to be heard upon demurrer of defendant to plaintiff's plea in abatement and the Court having heard argument of counsel thereon takes the same under advisement.

36 Then afterwards, to-wit, on the 19th day of May in the term and year last aforesaid, the following further proceedings were had in said Court in said case and entered of record to-wit:

ELBEE PATCH, Administrator of Estate of Charles W. Maxon, Deceased,
vs.
WABASH RAILROAD COMPANY.

Trespass.

This day come again the parties by their attorneys and the Court being now fully advised sustains the demurrer of the defendant to plaintiff's plea in abatement to the jurisdiction of this Court. To which ruling of the Court the plaintiff excepts and elects to stand by his plea.

It is therefore ordered and adjudged by the Court that the defendant recover of the plaintiff its costs and charges by it about its defense in this behalf expended to be paid by plaintiff in due course of administration.

To which entry of judgment plaintiff excepts.

And afterwards, to-wit on the 31st day of May in the term and year last aforesaid, the following further proceedings were had in said Court in said case and entered of record, to-wit:

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased,
vs.
WABASH RAILROAD COMPANY.

Trespass.

This 31st day of May comes the plaintiff, by his attorneys, and files herein and presents to the Court his petition praying for the

allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also in his petition that the ques-
37 tion of jurisdiction in issue be certified according to the Act of Congress of March 3, 1891, and, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $500.00 which shall operate as a supersedeas bond which is now presented and approved by the Court.

Petition for Writ of Error.

In the Circuit Court of the United States for the Southern District of Illinois. At Law.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,
v.
WABASH RAILROAD COMPANY, Defendant.

And now comes Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, plaintiff herein, and says:

That heretofore in this cause the Circuit Court of the United States for the Southern District of Illinois sustained the defendant's demurrer to the plaintiff's plea in abatement to the jurisdiction of this Court, and, on or about May 19, 1906, after plaintiff had elected to abide his said plea, entered judgment herein in favor of the defendant and against the plaintiff, in which judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of the plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that this Court certify, con-
38 formably to the Act of Congress of March 3, 1891, chapter 517, the question of jurisdiction of the Court, in issue; and, that a writ of error issue in this behalf out of the Supreme Court of the United States for the correction of the errors complained of; and, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

GEORGE C. OTTO AND
SHUTT, GRAHAM & GRAHAM,
Attorneys for Plaintiff.

(Indorsed:) Filed May 31, 1906. James T. Jones, Clerk.

Assignment of Errors.

In the Circuit Court of the United States for the Southern District of Illinois.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,
vs.
WABASH RAILROAD COMPANY, Defendant.

The plaintiff in this action, Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, in connection with his petition herein for a writ of error, makes the following assignment of errors, which he avers exist:

First. The Court erred in sustaining the defendant's demurrer to the plaintiff's plea in abatement to the jurisdiction of the Court.

Second. The Court erred — holding that it had jurisdiction or power to entertain the suit.

Third. The Court erred in entering judgment in favor of the defendant and against the plaintiff.

39 Wherefore, the plaintiff prays that said judgment may be reversed, and the cause remanded, with directions according to law.

GEORGE C. OTTO AND
SHUTT GRAHAM & GRAHAM,
Attorneys for Plaintiff.

(Indorsed:) Filed May 31, 1906. James T. Jones, Clerk.

Bond on Writ of Error.

In the Circuit Court of the United States for the Southern District of Illinois.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,
v.
WABASH RAILROAD COMPANY, Defendant.

Know all men by these presents, that we, Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased as principal, and Ætna Indemnity Company, as surety, are held and firmly bound unto Wabash Railroad Company, in the penal sum of Five Hundred Dollars ($500), lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Witness our names and seals, this 31st day of May A. D. 1906.

The condition of the above written obligation is such that, whereas the said Wabash Railroad Company did on the 19th day of May

A. D. 1906, in the Circuit Court of the United States for the Southern District of Illinois, recover a judgment against the above bounden Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, from which judgment of the said Cir-
40 cuit Court of the United States, the said Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, has, *has* sued out a writ of error to the Supreme Court of the United States:

Now, therefore, if the said Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, shall prosecute his said writ of error with effect, and, moreover, pay the amount of the judgment, interest, damages and costs, rendered and to be rendered against him, in case the said judgment shall be affirmed, then the above written obligation is to be void; but otherwise to remain in full force and effect.

ELBEE PATCH, [SEAL.]
Administrator de bonis non of the Estate of Charles W. Maxon, Deceased.
THE ÆTNA INDEMNITY COMPANY, [SEAL.]
By CARL M. ERDMAN, *Resident Vice-President.*

Attest:
H. M. HUTCHINSON,
Resident Assistant Secretary.

(Indorsed:) Filed May 31, 1906. James T. Jones, Clerk.

Certificate of Judge as to Jurisdiction.

In the Circuit Court of the United States for the Southern District of Illinois.

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased, Plaintiff,
v.
WABASH RAILROAD COMPANY, Defendant.

Certificate.

In this cause, I hereby certify that the judgment herein rendered is based solely on the ground that the record, in my opinion shows that the controversy involved is one between citizens of different states, and that the defendant is not a citizen of, or resident in, the State of Illinois where the suit was brought; that no other ground of jurisdiction appears, and jurisdiction was retained only
41 for the reasons above stated.

This certificate is made conformably to the act of Congress of March 3, 1891, Chapter 517.

Dated this 1st day of June A. D. 1906.

HUMPHREY,
United States District Judge.

(Indorsed:) Filed June 1, 1906. James T. Jones, Clerk.

Afterwards, to-wit, on the 9th day of June in the year last aforesaid came again the defendant by its attorneys and filed in the Clerk's office of said Court its motion and notice in said case as follows, to-wit:

In the Circuit Court of the United States for the Southern District of Illinois.

WABASH RAILROAD COMPANY
ats.
ELBEE PATCH, Adm'r, etc.

Case.

Now comes the defendant by its attorneys and moves the Court for an order rescinding and annulling the certificate heretofore granted in this cause bearing date 31st day of May, 1906, or for such other order by way of amendment or otherwise as the Court shall seem meet, so that the records of the proceedings in this cause shall truly set forth the fact with respect to the questions herein actually determined by the Court.

And in support of said motion the defendant shows to the Court:

1. That said certificate was inadvertently and improvidently executed and was obtained upon the last day of June term 1906 of this Court without knowledge of or notice to the defendant or its attorneys.

2. That the question of jurisdiction by reason of diversity of citizenship between plaintiff and defendant was not in fact deter-
42 mined in this action nor was jurisdiction thereof reserved as recited in this certificate by reason of such diversity of citizenship.

3. That the only question determined was the insufficiency of the plaintiff's plea in abatement.

4. That the defendant's demurrer to said plea of abatement was not in fact sustained upon the ground of diversity of citizenship of the parties from the averments of the pleadings but upon entirely different grounds to-wit:

The lack of status in the plaintiff as a citizen of Ohio and non-resident of Illinois to act as administrator under the statutes of Illinois in bringing and maintaining this action and filing said plea and upon other ground not involving the question of diversity of citizenship.

McANULTY & ALLEN,
Attorneys for Defendant.

Take notice that the foregoing motion will be called up for hearing before the Hon. J. Otis Humphrey, presiding judge of said Court on Tuesday, the 12th day of June, 1906, at the hour of ten o'clock in the forenoon, or so soon thereafter as said motion can be heard at the United States Court Room in the City of Springfield, Illinois.

To Messrs. Shutt, Graham & Graham and Geo. C. Otto, Attorneys for plaintiff.

McANULTY & ALLEN,
Attorneys for Defendant.

(Indorsed:) Filed June 9, 1906. James T. Jones, Clerk.

43 Afterwards, to-wit on the 13th day of June in the June term of said Court in the year last aforesaid the following further proceedings were had in said Court in said case and entered of record to-wit:

ELBEE PATCH, Administrator *de bonis non* of the Estate of Charles W. Maxon, Deceased,

vs.

WABASH RAILROAD COMPANY.

Trespass.

This cause came on to be heard on motion of the defendant for an order annulling or amending a certain certificate as to jurisdiction, dated the 31st day of May, 1906, and the Court having heard the argument of counsel for defendant in support of said motion and of counsel for plaintiff in opposition thereto upon examination of said certificate, finds the same was inadvertently signed under a mistake as to the nature and contents thereof and that the matters determined by the Court are not correctly set forth therein.

It is therefore ordered by the Court that said certificate be amended so as to read as follows: "In this cause I hereby certify that this action was brought in the Circuit Court of the County of Sangamon, State of Illinois and was afterwards removed to this Court by the defendant upon its petition for removal based solely upon the ground of diverse citizenship between the parties wherein it stated among other things that it the defendant was a corporation organized under the laws of the State of Ohio and a citizen of said State of Ohio and a non-resident of the State of Illinois, and that the plaintiff was a citizen of the State of Illinois; that after said cause was removed to this Court the plaintiff filed a plea in abatement to the jurisdiction of the Court alleging amongst other things that the plaintiff was a citizen of the State of Ohio; that the defendant demurred generally and specially to said plea, that said demurrer was argued by

44 counsel for the parties and the demurrer sustained, the Court being of opinion that said plea was defective in that from the averment therein that the plaintiff was a citizen of the State of Ohio it followed as a necessary inference that his legal residence was also in the State of Ohio and hence that he was a non-resident of the State of Illinois and therefore deprived of any status to maintain this action or to file said plea under the Statute of the State of Illinois prohibiting a non-resident of said State from acting as administrator therein; that upon said demurrer having been sustained the plaintiff elected to stand by his plea and judgment was thereupon rendered in favor of the defendant and against the plaintiff for costs; that said cause was pending in this Court solely upon the ground of alleged diversity of citizenship between the plaintiff and defendant but that the question of jurisdiction was not passed upon by the Court.

To the entry of this order the plaintiff excepts.

45 UNITED STATES OF AMERICA,
Southern District of Illinois, Southern Division, ss:

I, James T. Jones, Clerk of the Circuit Court of the United States for the Southern District of Illinois Southern Division do hereby certify that the foregoing is a true and complete transcript of all the papers filed and proceedings thereon had in a certain case wherein Elbee Patch Administrator *de bonis non* of the estate of Charles W. Maxon, deceased, is plaintiff and the Wabash Railroad Company is defendant, as the same appear of file and record in my office.

In Witness Whereof I have hereunto set my hand and Seal of said Court at Springfield in said District this sixteenth day of June in the year of our Lord one thousand nine hundred and six and of our Independence the one hundred and thirtieth year.

[The Seal of the Circuit Court of the United States, South. Dist. Ill.]

JAMES T. JONES, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

To Wabash Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of Error, filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of Illinois, wherein Elbee Patch, Administrator *de bonis non* of the Estate or Charles W. Maxon, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff as in the said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. Otis Humphrey, District Judge, this first day of June, in the year of our Lord one thousand nine hundred and six.

J. OTIS HUMPHREY, *Judge.*

47 On this fourth day of June, in the year of our Lord one thousand nine hundred and six, personally appeared before me, the subscriber, Hugh J. Graham and makes oath that he delivered a true copy of the within citation to Walter M. Allen, personally known to him to be a member of the firm of McAnulty and Allen, the said firm being personally known to him to be the same that represented the Wabash Railroad Company, in the within named cause, on June 4th, 1906.

HUGH J. GRAHAM.

Sworn to and subscribed the 4th day of June, A. D. 1906.

[The Seal of the Circuit Court of the United States, South. Dist. Ill.]

JAMES T. JONES, *Clerk.*

[Endorsed:] No. —. Supreme Court of the United States. Elbee Patch, Administrator *de bonis non* of the Estate of Charles W. Maxon, dec'd, *vs.* Wabash Railroad Company. Citation to the Supreme Court of the United States.

Endorsed on Cover: File No. 20,293. S. Illinois C. C. U. S. Term No. 328. Elbee Patch, administrator *de bonis non* of the estate of Charles W. Maxon, deceased, plaintiff in error, *vs.* Wabash Railroad Company. Filed June 25, 1906. File No. 20,293.

No. 67.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1897.

ELBEE PATCH, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF CHARLES W. MAXON, DECEASED,
Plaintiff in Error,
vs.
WABASH RAILROAD COMPANY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

GEORGE C. OTTO,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907.

ELBEE PATCH, administrator de bonis non of the estate of CHARLES W. MAXON, deceased, *Plaintiff in Error,* *vs.* WABASH RAILROAD COMPANY, *Defendant in Error.*	Error to the Circuit Court of the United States for the Southern District of Illinois.

Brief and Argument for Plaintiff in Error.

STATEMENT.

MAY IT PLEASE THE COURT:

This cause was brought before this court by writ of error to the Circuit Court of the United States for the Southern District of Illinois, under the first clause of section 5 of the act of March 3, 1891, the only question for review being whether the suit was one of which that court had jurisdiction upon removal from the state court. The ground of jurisdiction claimed was diverse citizenship. The plaintiff in error contends that he is a citizen of Ohio, and the defendant in error a consolidated railroad company created under the laws of Illinois, Missouri, Indiana, Michigan and Ohio.

The action below was commenced in the *Circuit Court of Sangamon County, Illinois*, by the plaintiff in error. The defendant in error procured the cause to be removed thence to the Federal Court, upon allegations to the purport that it was a corporation created under the laws of the State of Ohio, and a citizen of that state, and not a resident of the State of Illinois, and that *the plaintiff was a citizen of the State of Illinois.*

After removal, the plaintiff challenged the authority of the court by a plea in the nature of a plea in abatement to the jurisdiction, in which (omitting the formal parts) he alleged:

> "That before and at the time of the commencement of this action said defendant was *a railroad corporation, created* under and by virtue of the laws of the States of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five *other* railroad corporations; and, that one of said other corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, one was a corporation created, organized and existing under and by virtue of the laws of the State of Missouri, one was a corporation created, organized and existing under and by virtue of the laws of the State of Indiana, one was a corporation created, organized and existing under and by virtue of the laws of the State of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the State of Ohio; that said consolidation was effected, and said defendant corporation was organized, and before and at the time of the commencement of this action, *existed under and by virtue of the laws of the State of Illinois* and the laws of each of said four other states; and that before and at the time of the commencement of this action, said defendant was, and still is, a citizen of and resident in the State of Illinois and each of said four other states; and that be-

fore and at the time of the commencement of this action *this plaintiff was and still is a citizen* of the State of *Ohio*."

To that plea the defendant demurred generally and specially, assigning for cause of demurrer that the plea was not responsive, neither traversed nor confessed and avoided, and contained allegations foreign to the issue "tendered."

Argument was heard before the Hon. J. Otis Humphrey, district judge, upon the issue so joined; the court sustained the demurrer; the plaintiff elected to stand by his plea, and thereupon the court gave final judgment for the defendant.

Judgment was rendered on the 19th day of May, A. D. 1906, and the order ran as follows:

> "This day come again the parties by their attorneys and the court being now fully advised sustains the demurrer of the defendant to plaintiff's plea in abatement to the jurisdiction of this court. To which ruling of the court the plaintiff excepts, and elects to stand by his plea.
>
> "It is therefore ordered and adjudged by the court that the defendant recover of the plaintiff its costs and charges by it about its defense in this behalf expended to be paid by plaintiff in due course of administration.
>
> "To which entry of judgment plaintiff excepts."

Subsequently, but during the term at which the judgment was rendered, the plaintiff filed an assignment of the errors relied on, and presented a petition praying for a certificate of the question of jurisdiction in issue and for a writ of error, which were granted, issued and filed.

It was not believed then, nor is it now, that the certificate of the question of jurisdiction in issue was

necessary. It was procured merely out of abundant caution. For convenience it may be inserted here. It runs as follows;

> "In this cause, I hereby certify that the judgment herein is based solely on the ground that the record, in my opinion, shows that the controversy involved is one between citizens of different states, and that the defendant is not a citizen of, or resident in, the State of Illinois where the suit was brought; that no other ground of jurisdiction appears, and jurisdiction was retained only for the reasons above stated.
>
> "This certificate is made conformably to the act of congress of March 3, 1891, chapter 517." (Pr. Rec., 26.)

After the certificate and writ of error had been filed and that term of court had elapsed, but before the transcript was entirely prepared, the court, on motion of defendant in error, and against the objection of the plaintiff in error, assumed to amend away the certificate of the question of jurisdiction, and to certify to this court that, although the question of jurisdiction was raised, it was not passed upon, but that the court nevertheless rendered judgment for the defendant. (Pr. Rec., 28.) The plaintiff in error will make no other reference to that amendment, but proceed upon the theory that it is without legal significance.

The cause of action accrued and the letters of administration were granted in the State of Illinois (as the record discloses), but it is believed that those facts can have no significance, on consideration of the questions arising on this writ of error.

The entire record is contained in the printed transcript.

For the court's convenience, there are printed in the

appendix to this brief (1), those sections of the respective constitutions of the five states which have a bearing on the subject, and, also (2), those statutes of each of the five states, under and by virtue of which the consolidation was effected and the defendant corporation created, and (3), the agreement between the five original companies, being the writing of incorporation of the defendant company. It is believed that none of these things is of any particular importance. The question is not as to the proper construction of state constitutions or statutes, or as to the intent indicated in the incorporation papers; but, as to the legal import of facts pleaded. However, in the determination of that question, a clear understanding of the situation is desirable, and to that end only the appendix will be helpful.

ERRORS RELIED UPON.

First. The court erred in sustaining the defendant's demurrer to the plaintiff's plea in abatement to the jurisdiction of the court.

Second. The court erred in holding that it had jurisdiction or power to entertain the suit.

Third. The court erred in entering judgment in favor of the defendant and against the plaintiff.

BRIEF.

I.

THE JURISDICTION OF THE COURT WAS IN ISSUE.

Rhode Island v. *Massachusetts*, 12 Pet., 657, at 718–20.
Capron v. *Van Noorden*, 2 Cranch., 126.
Brown v. *Keene*, 8 Pet., 112.
M. C. & L. M. Ry. Co. v. *Swan*, 111 U. S., 379, at 832.
Morris v. *Gilmer*, 129 U. S., 315.
Wetmore v. *Rymer*, 169 U. S., 115.
People v. *Seelye*, 146 Ill., 189.
Bassick Mining Co. v. *Schoolfield*, 10 Col., 46.
United States v. *Arrendondo*, 6 Pet., 691, 709.
Grignon's Lessee v. *Astor*, 2 How. 319, 338.
Dred Scott v. *Sandford*, 19 How., 393, 427.
Interior Construction Co. v. *Gibney*, 160 U. S., 217.

II.

THE PLAINTIFF WAS A CITIZEN OF OHIO.

III.

THE DEFENDANT WAS A CITIZEN AND RESIDENT (1) OF ILLINOIS (THE STATE IN WHICH THE SUIT WAS BROUGHT) AND, ALSO (2) OF EACH OF THESE STATES OF MISSOURI, INDIANA, MICHIGAN AND OHIO.

Ashley v. *Ryan*, 49 Ohio St., 504 (1892).
Ashley v. *Ryan*, 153 U. S., 436 (1893).
Westheider v. *Wabash R. R. Co.*, 115 Fed., 840 (1892).
Winn et al. v. *Wabash R. R. Co.*, 118 Fed., 55.
Sheppard et al. v. *Graves*, 14 How., 505, at 510.
Chitty on Pleading, Ch. VI., Tit., I.
Stephen on Pleading, (Tyler's ed.), p. 84.
Bacon Ab., Abatement.
C. & N. W. Ry. Co. v. *Ohle*, 117 U. S., 123.
Jones et al. v. *League*, 18 How. 76, 81.
18 U. S. Stat at L. 472.
St. Louis & S. F. Ry. Co. v. *James*, 161 U. S., 545.
Louisville R. R. Co. v. *Letson*, 2 How., 497, 558.
Bank of Augusta v. *Earle*, 13 Pet., 512.
Marshall v. *B. & O. R. R. Co.*, 16 How., 314, 328.
Railroad Co. v. *Harris*, 12 Wall., 65, 68.
Covington Draw Bridge Co. v. *Shepherd et al.*, 20 How., 227.
Southern Ry. Co. v. *Allison*, 190 U. S., 326.
Ohio & M. R. Co. v. *Wheeler*, 1 Black (66 U. S.), 286, at 295–6.
Phila. & Wilm. R. R. Co. v. *Maryland*, 10 How., 376, 392.
Lafayette Ins. Co. v. *French*, 18 How., 404.

Paul v. *Virginia*, 8 Wall., 168, 181.
Shields v. *Ohio*, 95 U. S., 319.
Atlantic & G. R. Co. v. *Georgia*, 98 U. S., 359.
Railway Co. v. *Berry*, 113 U. S., 465.
Railway Co. v. *Miller*, 114 U. S., 176.
Keokuk & W. R. Co. v. *Missouri*, 152 U. S., 301.
State v. *Keokuk & W. Ry. Co.*, 99 Mo., 30.
Evans v. *Railway Co.*, 106 Mo., 601.
State v. *Leuseur*, 145 Mo., 322.
McMahon v. *Morrison*, 16 Ind., 172.
Walters v. *Railroad Co.*, 104 Fed., 377.
Pac. Ry. Co. v. *Mo. Pac. Ry. Co.*, 23 Fed., 565.
Uphoff v. *Chi., &c., R. Co.*, 5 Fed., 545.
Fitzgerald v. *Mo. Pac. Ry. Co.*, 45 Fed., 812.
Johnson v. *W. & B. R. Co.*, 9 Fed., 6.
Anderson v. *Watt*, 138 U. S., 694, 701.
Louisville, &c., R. Co. v. *Louisville Trust Co.*, 174 U. S., 552.
Farnham v. *Canal Co.*, 1 Sumner, 47.
Mower v. *Kemp*, 42 La. Ann., 1,007.
R. & M. R. Co. v. *Farmers' L. &. T. Co.*, 49 Ill., 331.
C. & N.-W. Ry. Co. v. *Aud. Gen.*, 53 Mich., 79, 91.
Market St. R. Co. v. *Hellman*, 109 Cal., 571.
B. & O. R. Co. v. *P. W. & Ky. R. Co.*, 17 W. Va., 812.
Henen, Admr., v. *B. & O. R. Co.*, 17 W. Va., 882.
Whitton, Admr., v. *C. & N.-W. Ry. Co.*, 13 Wall., 270.
Muller v. *Dows*, 94 U. S., 444.

ARGUMENT.

I.

THE JURISDICTION OF THE COURT WAS IN ISSUE.

After removal to the Federal Court, the plaintiff filed a plea in the nature of a plea in abatement to the jurisdiction, (Pr. Rec., 20), the defendant demurred to that plea, (Pr. Rec., 22), argument was heard thereon, the court sustained the demurrer, the plaintiff elected to stand by his plea, and the court gave final judgment for the defendant. (Pr. Rec., 23.)

Upon what rational pretence it can be contended, in the face of that record, that the question of jurisdiction was not in issue, has from the first been, and now remains, unknown to counsel for plaintiff in error. That it *was*, would seem to be so clear as to exclude the possibility of controversy.

However, as the plaintiff in error has at no time either sought or desired the review of any other question than that of jurisdiction, and the writ of error neither does nor could bring up any other, it may be expeditious to inquire briefly here as to what the legal import of the action taken by the court was, to the end of ascertaining whether there is anything for this court to consider.

That after removal the plaintiff filed a plea in the nature of a plea in abatement to the jurisdiction of the court, and the defendant demurred to that plea, and the court sustained the demurrer, and, on the plaintiff's

election to stand by his plea, gave judgment for the defendant, are facts shown by the record, and do not admit of argument. If there is any question here, it depends upon the effect of the action of the court.

In an early case, in which eminent counsel were arrayed on either side, this court said:

> "The case is now before us for consideration on a motion by the defendant to dismiss the bill for want of jurisdiction in the cause.
>
> "However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, *it must be considered and decided before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction.* Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate *or exercise any judicial power over them;* the question is, whether on the case before a court their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. *If the law confers the power to render a judgment* or decree, *then the court has jurisdiction;* what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it.
>
> * * * * *
>
> "But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. *And whether the want or excess of power is objected* by a party, OR IS APPARENT TO THE COURT, *it must surcease its action, or proceed extra-judicially.*"
>
> *State of Rhode Island* v. *The Commonwealth of Massachusetts*, 12 Peters', 657, at 718–20 (1838).

Later it said:

> "On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch., 126, decided in 1804, when a judgment was reversed on the application of the party against whom it had been rendered in the Circuit Court, for want of allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked. The case was cited with approval by Chief Justice John Marshall in *Brown* v. *Keene*, 8 Pet., 112."
>
> *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S., 379, at 382.

And that statement was quoted and approved in later cases. See, among others, the following:

Morris v. *Gilmer*, 129 U. S., 315 (1889),
Wetmore v. *Rymer*, 169 U. S., 115 (1898),
People v. *Seelye*, 146 Ill., 189.
Bassick Mining Co. v. *Schoolfield*, 10 Col., 46.
United States v. *Arredondo*, 6 Pet., 691, 709.
Grignon's Lessee v. *Astor*, 2 How., 319, 338.

And Mr. Chief Justice TANEY, delivering the opinion of the court in a celebrated case, said:

> "The principle of law is too well settled to be disputed that a court can give no judgment for either party, where it has no jurisdiction."
>
> *Dred Scott* v. *Sandford*, 19 How., 393, 427.

And see, particularly:

Interior Construction, &c., Co. v. *Gibney*, 160 U. S., 217.

The court heard arguments on the demurrer to the plea. It did not remand the case. It did move further in the cause. It exercised judicial power. It rendered final judgment.

This court is to inquire, not so much what the court below did, as *whether*, upon the record, *it was*, in law, *authorized to do anything*, other than send the case back to the court from whence it came. Its right was questioned on the record. It did not yield, but assumed to dispose of the controversy.

II.

THE PLAINTIFF WAS A CITIZEN OF OHIO.

The averment contained in the plea, "that before and at the time of the commencement of this action, this plaintiff was, and still is, a citizen of the State of Ohio," was admitted to be true by the demurrer. Such an averment has ever been held sufficient, as to the citizenship of a natural person; and the citation of authorities is deemed unnecessary.

III.

THE DEFENDANT WAS A CITIZEN AND RESIDENT (1) OF ILLINOIS (THE STATE IN WHICH THE SUIT WAS BROUGHT), AND, ALSO (2), OF EACH OF THE STATES OF MISSOURI, INDIANA, MICHIGAN AND OHIO.

Under this head naturally fall the few questions in the case that really admit of argument. Before entering upon their discussion, it will be well to note somewhat the state of affairs obtaining at the time this controversy arose.

The defendant was incorporated about the middle of the year 1889, in the manner alleged in the plea. Since that time it has, *on the ground of diversity of citizenship*, brought suits in the Federal courts against citizens of the states of its origin, and removed to those courts suits brought against it by such citizens—with a freedom and frequency explainable only by the general want of information among the members of the bar as to the facts and the law touching its creation. Apparently, its officers and agents have not hesitated to make the representations and affidavits necessary for such purposes. In the few cases, and they have been very few, in which opposing counsel were aware of the facts and understood their legal effect, the cases have usually been either settled or remanded. The dockets of Federal courts in the various districts through or into which its lines pass, are, and long have been, encumbered with its cases. Some of the reasons prompting that conduct, are to be found in the rules heretofore obtaining in the Federal courts as to fellow-servants, the weight of costs in those courts and the delays incident to removal. In cases such as the present one, railroad companies have long sought to gain time by delay, while evidence material to the cases against them has rested in the memory of witnesses, that such evidence might be lost through their death or removal, or growing indifference under the warmth of the defendants' favors, and the plaintiffs be thereby left powerless on the trial. The present case is illustrative. Had it remained in the state court, where it belonged, it would have been tried on the merits, in September, 1905. The writer is not here contending with the defendant alone, but with a system that has been established, and under which those who have not

the means to defray expenses and dispense favors and wait, sink beneath the burdens imposed, and fall easy prey to those that have. The inevitable result of the continued maintenance of such a system must be to bring courts into contempt, and to cause declarations such as that in our Illinois bill of rights, that every person "*ought to obtain right and justice freely, without being obliged to purchase it, completely, and without denial,* PROMPTLY AND WITHOUT DELAY," to fall upon the ears of the victims of that system as words of sarcasm. Certainly some should stoop to help the victims of such a juggernaut. At least, the courts of the United States should not be permitted to be used as instruments of such injustice. The question of the right of such a corporation to remove cases to the Federal courts on the ground of diverse citizenship should be decided once and forever.

It is believed that no one else has with such persistency and effrontery as this defendant, forced cases into the Federal courts, without shadow of right in law. Notwithstanding that fact, but four opinions (two of them in the same case) have been reported, which in anywise touch upon the question of the defendant's incorporation. They will be mentioned in chronological order.

The first is *Ashley* v. *Ryan*, 49 Ohio St., 504 (1892). That suit was commenced in the state court in Ohio, on this defendant's behalf, by one of its incorporators, to restrain the Secretary of State of Ohio from covering into the state treasury the sum of $52,000, payment of which had been required by the secretary of state of that state, as the license fee under the laws of Ohio, for consolidation, and to recover all but $700 of that

amount. A copy of the agreement of consolidation was attached to the original petition as "Exhibit A," and was printed in the record when the case reached this court. The Ohio Supreme Court said that a new corporation had been created by consolidation, and upheld the exaction of the fee.

The second is *Ashley* v. *Ryan*, 153 U. S., 436, in the same case on appeal to this court, which sustained the decision of the court below. Both opinions are instructive upon the issues here.

The third is *Westheider* v. *Wabash Railroad Co.*, 115 Fed., 840, rendered in the Circuit Court of the United States for the Southern District of Illinois, in *May*, 1902, upon a question similar to the one passed upon by that court in this case. Perhaps nothing more forcibly illustrates the extent to which the defendant has imposed upon the courts and opposing counsel, than the opinion in that case. The court there found, that the defendant was created under the laws of the State of Ohio on the first day of August, 1889, and that the property of the five original companies was thereafter *conveyed* to it. Now by reference to the opinions of the Supreme Court of Ohio and of this court in the case of *Ashley* v. *Ryan*, already cited, it will be observed that August 1, 1889, was the day the articles of agreement for consolidation were tendered to the secretary of state of Ohio for filing. When it is borne in mind (1) that in the case of *Ashley* v. *Ryan* it was claimed on behalf of this defendant that it was a corporation of each of the five states, and (2) that since that case was decided the defendant has persistently claimed to be a corporation of Ohio only, and so claimed in the Westheider case, in which an opinion in

its favor was filed and published, and (3) that in the case of *Winn et al.* v. *Wabash R. R. Co.*, to be noticed presently, and which was decided subsequent to the Westheider case, it admitted expressly and in detail the facts disclosed by the plea in the present case, and then, upon decision against it, omitted to carry the case to a court of review, its method of procedure becomes clear.

The fourth is *Winn et al.* v. *Wabash Railroad Co.*, 118 Fed., 55, rendered by Thayer, Circuit judge, and Philips and Adams, District judges, in the Circuit Court of the United States, for the Western District of Missouri, Western Division, in *October*, 1902. The question there was the right of removal from the State to the Federal Court, on the ground of diverse citizenship, as to a citizen of Missouri. The same question had arisen in the *Eastern District* of that state also, and the two cases were heard together. The court held that a provision of the Missouri constitution, to the effect that if a corporation of that state consolidated with a corporation of another state, the consolidated company should be deemed a citizen of Missouri, *imposed* citizenship in that state as one of the conditions of consolidation, and, that as the defendant had taken the benefits, the burden followed. In view of the ground upon which the opinion was placed, it is of little weight as an authority, outside the State of Missouri; and it is believed that its reasoning is erroneous and has tended to mislead the members of the profession.

It will be seen, therefore, that, when this controversy arose, the question of this defendant's citizenship had not reached a court of review, and that no trial court had decided it upon principle.

In disputing the jurisdiction of the courts of the United States, a practice chiefly notable for extreme laxity in matters of form, has grown up; fostered no doubt by legislation. It is held that, as these are courts of special and limited jurisdiction, a motion to dismiss or to remand suffices, when the ground of jurisdiction does not appear affirmatively on the record. And this court itself has held (*Morris* v. *Gilmer*, 129 U. S., 315) that, even though the record contains the proper and usual jurisdictional averments, if the evidence introduced shows that those averments are untrue, a motion to dismiss or remand should then be sustained; and, further, that the trial court should take judicial notice of such conflict between the averments and the evidence, and act thereon, or couse the issue to be made up and tried. Further, it is held that if the party assailing the jurisdiction presents affidavits setting forth facts sufficient to defeat it, and thereupon moves to dismiss or remand, the motion must be allowed, unless that showing is overcome. And this latter method is, it is believed, the one most frequently followed. For the purpose of disputing the jurisdiction of these courts, pleas appear to have fallen somewhat into disuse. From the reports it would seem that often when used they have been heterogeneous in nature. Two different theories, that of a plea to the merits, and that of a plea in the nature of a plea in abatement to the jurisdiction, have been confounded. Of this sort was, among others, the plea in the case of *Dred Scott* v. *Sandford*, 19 How., 393, 568, which Mr. Justice CURTIS held to be a special traverse of the plaintiff's allegation of his citizenship, and demurrable because of insufficiency of the facts therein alleged to

negative those averments in point of law. But he says (p. 569):

> "No doubt the defendant might have traversed, by a common or general traverse, the plaintiff's allegation that he was a citizen of the State of Missouri, concluding to the country."

But that is the theory of a plea to the merits, *accepting* issue; and the burden of proof would then be upon the party averring jurisdiction. No one would deny that such a plea even when used to dispute jurisdiction, should be governed, at least to a large extent, by the rules governing a plea to the merits; unless, indeed, the denial should be upon the ground that those rules have been relaxed by legislation concerning the jurisdiction of these courts. While it would, no doubt, be sufficient: it would be strictly a *plea to the jurisdictional averments*, and bear no analogy to a plea to the jurisdiction as it was known at common law.

At common law, exceptions to the authority of the superior courts generally had to be taken by plea to the jurisdiction in the nature of a plea in abatement. It was pleaded in person (unless the defendant was a corporation, or for other reason incapable of appearing in person); it made half defense; it showed cause affirmatively why the court ought not to have or take jurisdiction; it concluded with a verification, and prayer for judgment on the plea; and was followed by an affidavit of the truth of the statements it contained.

It never traversed, either generally or specially, never confessed and avoided, and never concluded to the country.

The pleader had the burden of both averring and

proving the facts relied upon to overcome the presumption of jurisdiction.

Now, this court, in a unanimous opinion delivered as long ago as 1852, while Mr. Chief Justice Taney was on the bench, said:

> "Although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading, *to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the exception.* Such, we think, would be the proper rule resulting from the intrinsic character of the exception, and such we consider the doctrine enunciated in the cases of *Conrad* v. *The Atlantic Insurance Company*, in 1 Pet., 386, and *D'Wolf* v. *Rabaud et al., Id.*, 476.
>
> "*This doctrine we are unwilling to disturb.*"
>
> *Sheppard et al.* v. *Graves*, 14 How., 505 at 510.

There can be no doubt that the court when using that language had in mind an affirmative plea in the nature of a plea in abatement to the jurisdiction. And by that name, let it be noted, it is continually called by this court. Speaking of such pleas, Chitty says:

> "Pleas of this description though in effect they abate the writ, yet differ from pleas in abatement, principally in three points, viz: that they must be pleaded in person; that only half defense should be made; and that they should conclude *si curia cognoscere velit*, and not *quod billa cassetur*."
>
> Chitty on Pleading, Ch. VI, Tit. I. (Vol. 1, p. 441).

Stephen, speaking of a plea to the jurisdiction, gives the following as an example:

> "And the said C. D., in his proper person, comes and defends the force and injury, and says," (and after showing cause and that another court has jurisdiction, the plea concludes) "And this he is ready to verify. Wherefore, . . . the said C. D. prays judgment, if the court of our lord the king here will or ought to have further cognizance of the plea aforesaid."
>
> Stephen on Pleading, (Tyler's ed.), p. 84.

The purpose of such a plea seems always to have been *to show cause* why the court ought not to have jurisdiction. And therein is the analogy to a plea in abatement, as appears by Bacon's definition.

> "Abatement, in the general acceptation of the word, signifies a plea, put in by the defendant, in which he shows cause to the court why he should not be impleaded; or, if impleaded, not in the manner and form he now is."
>
> Bacon Ab., "Abatement."

And such appears to have been the theory of the plea in each of divers cases that have been reviewed by this court.

Ohle, a citizen of Illinois, brought suit in the State Court in Iowa, against the Chicago & Northwestern Railway Company. The company procured the cause to be removed to the Circuit Court of the United States, on the ground that Ohle was a citizen of Iowa, and it was a corporation of Illinois. Ohle moved to remand, and later, and on May 22, 1884, he was given leave to file a plea in abatement or to the jurisdiction, which he did August 29, 1884, *alleging that both he and the defendant were citizens of Illinois*. Upon this plea issue

was joined, and a trial had with a jury, October 30, 1884. The jury found that Ohle was a citizen of Illinois. On error the judgment was affirmed by this court.

Chi. & N. W. Ry. Co. v. *Ohle*, 117 U. S., 123, *Waite*, C. J. (1886).

League brought his petition in the District Court of the United States for the District of Texas, to try title to certain land, and therein averred that he was a citizen of Maryland. In the statement preceding the opinion, it is said:

> "The defendants pleaded four pleas in abatement to the jurisdiction of the court. * * * The fourth alleged that, at the time of the commencement of the suit, League was a citizen of the State of Texas."

Issue was joined upon that plea; and the trial court found for the plaintiff. This court reversed the judgment, for want of jurisdiction in the lower court, and said:

> "At an early period of this court, it was held in some of the circuit courts, that the averment of citizenship, to give jurisdiction, must be proved on the general issue. And as a consequence of this view, if at any stage of the cause it appeared that the plaintiff's averment of citizenship was not true, he failed in his suit. But it is now held, and has been so held for many years, that if the defendant disputes the allegation of citizenship in the declaration, he must plead the fact in abatement of the suit; and that this must be done in the order of pleading, as at common law."

Jones et al. v. *League*, 18 How., 76, 81.

The effect, therefore, of jurisdictional averments in the declaration or petition for removal, is to raise a

presumption of jurisdiction. At common law, there always was such a presumption, in the Superior Courts; and the plea was to show why that presumption was without foundation.

Again, in removal cases, this exception is taken (usually) by the plaintiff. At common law, there was no such thing as a plea to the jurisdiction, *by the plaintiff*. And, as used in the Federal Courts, such a plea is always drafted in contemplation of the statute, and framed with a view to showing why the cause is not within its provisions. Not so, a general traverse. It takes no note of the statute, but simply calls for proof. While, at least as to the citizenship of a corporation, a special traverse would always be open to the objection that it amounted to a direct denial, if the strict rules of pleading are to apply.

Congress has provided:

> "That if, in any suit * * * removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court * * * the said Circuit Court shall proceed no further therewith, but shall * * * remand it to the court from which it was removed * * *" (18 U. S. Stat. at L. 472.)

It would seem, therefore, that it has been with much reason that the courts have held that, in such matters, the common law rules of pleading, in their strictness, no longer apply.

> "And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done

by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal."

Morris v. *Gilmer*, 129 U. S., 315, 326.

"Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the Circuit Court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the Circuit Court has in no respect been imposed upon."

Anderson v. *Watt*, 138 U. S., 694, 701.

From the opinion in a reported case it appears that the plaintiff sued in the state court in Michigan; the defendant procured the cause to be removed to the Circuit Court of the United States upon the ground of the existence of the necessary diversity of citizenship; and the plaintiff filed a plea in abatement to the jurisdiction, by her attorneys, alleging that she was a citizen of Russia and that the defendant was a foreign corporation formed and existing under and by virtue of the laws of the Dominion of Canada; and the defendant demurred specially to that plea, for that it was informal, and not pleaded in person, and on other grounds. The court said:

"The legal questions as to the sufficiency of the pleadings involved have been submitted to me by counsel for the respective parties upon briefs. In behalf of the defendant it is urged that the plea is not sufficient in matters of form when tested by the strict technical rules which at common law regulated pleas in abatement. I do not deem it necessary to determine whether or not this contention is well founded, for I am satisfied that this plea should not be tested by such rules. It is not such a pleading as should be looked upon

> with disfavor by the court, but is one which simply tenders an issue upon a material question of fact; *and it fairly and with sufficient certainty sets forth allegations as to matters of fact which, if proven, would clearly negative the jurisdiction of this court.* The function which such a plea performs is a substantive one, designed only for bringing forward an issue of fact in which the other party may join, and so a trial be had. An order overruling the demurrer must, therefore, be entered."
>
> *Johnson* v. *Accident Ins. Co.*, 35 Fed., 374.

In the plea (Pr. Rec., 20) the plaintiff, appearing in his proper person (doubtless unnecessarily), defends against the removal of the cause from the Circuit Court of Sangamon county, Illinois, to the Circuit Court of the United States for the Southern District of Illinois, and avers, with reference to the time of the commencement of the action, that the defendant was a corporation, and *the facts as to the source of the corporate existence*, and "that before and at the time of the commencement of this action, the said defendant was and still is, a citizen of, and resident in, the State of Illinois, and each of said four other states; and *that before and at the time of the commencement of this action, this plaintiff was, and still is, a citizen of the State of Ohio;*" and concludes, "and this he is ready to verify; wherefore he prays judgment whether this court will or can take cognizance of this action." It is signed in person and verified.

The plaintiff in error contends that in its material averments, it discloses the ultimate facts, and, that, therefore, whatever the citizenship of the defendant may be it arises upon those facts. Certain it is that its averments accurately follow and disclose the theory of the distinguished lawyer who drew the important

agreement of consolidation of the five original companies—the only writing of incorporation of the defendant company of record anywhere. Five different companies were incorporated, one in each of the states named; the five entered into an agreement of consolidation drawn in, at least supposed, conformity to the laws of each of the five states; that writing was prepared and executed in five counter-parts, one for each state, and filed one each in the offices of the several secretaries of state. That, under the law, was incorporation of the consolidated company—and all there was of it.

Now, the citizenship of a state corporation depends entirely upon the source of the corporate existence; and not at all upon the conditions or privileges imposed or granted by the law of that source, statutory or constitutional. The question, it is believed, has reference only to the jurisdiction of the Federal courts; and no state can either enlarge or restrict that jurisdiction. If any state should provide that a corporation thereof should not, for the purposes of federal jurisdiction, be a citizen of that state, or that it should be of some other state, every such provision would be ineffective. The denial of legislative paternity cannot alter the fact. And the provision of the Missouri constitution to the effect that such corporations as the defendant in error shall be considered domestic corporations in that state, is merely declaratory of what the law has been, now is, and must remain, without such provision.

> "A corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an arti-

ficial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person."

Louisville R. R. Co. v. *Letson*, 2 How., 497, at 558 (1844). Wayne J.

"In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of a numerous association to sue and be sued. 'And this corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation.' *Bank of Augusta* v. *Earle*, 13 Pet., 512. The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there, and can find them there and nowhere else."

Marshall v. *B. & O. R.R. Co.*, 16 How., 314, at 328 (1853). Grier, J.

"For the purposes of Federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive."

R. R. Co. v. *Harris*, 12 Wall., 65, at 82 (1870). Swayne, J.

"Inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created,

the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the State from which this legal being derived its existence, and its faculties and powers. * * * Consequently the Covington Drawbridge Company *being chartered by the State of Indiana*, IT NECESSARILY HAS ITS HOME AND PLACE OF BUSINESS IN THAT STATE."

Covington Drawbridge Co. v. *Shepherd et al.*, 20 How., 227, at 233 (1857). Taney, J.

"There is an indisputable legal presumption, that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States, which confers jurisdiction upon the Federal courts, in 'controversies between citizens of different States.'"

St. L. & S. F. Ry. Co. v. *James*, 161 U. S., 545, at 562 (1895).

See also to the same effect, the following cases:

Southern Ry. Co. v. *Allison*, 190 U. S., 326 (1903).

Ohio & M. R. Co. v. *Wheeler*, 1 Black (66 U. S.), 286, at 295–6 (1861). Taney, J.

And, after much strife, it has become settled law in this court, that to disclose the citizenship of such a corporation, it is necessary to aver only that it is a corporation, and the source of its existence.

"If the declaration set forth facts from which the citizenship of the parties may be presumed or

> legally inferred, it is sufficient. The presumption arising from the *habitat* of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that '*the defendants are a body corporate by the Act of the General Assembly of Maryland*,' is a sufficient averment that the real defendants are citizens of that State."
>
> *Marshall* v. *B. & O. R. R. Co.*, 16 How., 314, at 329 (1853).

Does not the plea in the present case aver that the defendant is a corporation, and the source of its existence? If it does not, it must be, because a corporation could not have been created in the manner alleged. To that argument there are two answers: *First*, opinions of this court to the contrary. *Second*, the fact, that it was so created, whether legally or illegally.

This court, in 1850, in an opinion delivered by Mr. Chief Justice TANEY, assumed the valid existence of such a corporation. (*Phila. & Wilm. R. R. Co.* v. *Maryland*, 10 How., 376, at 392.) And that opinion this court quoted approvingly, twenty years later, as follows:

> "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one. The Philadelphia, Wilmington, and Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland, Chief Justice Taney, in delivering the opinion of this court, said: 'The plaintiff in error is a corporation composed of several railroad companies, which had been previously chartered by the States of Maryland, Delaware, and Pennsylvania, and which, by corresponding laws of the respective

states, were united together and form one corporation, under the name and style of The Philadelphia, Wilmington and Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore.' He gives the history of the legislation by which this result was produced. No question was raised on the subject, but the opinion assumes the valid existence of the corporation thus created. The case was brought into this court under the 25th section of the judiciary act of 1789. *The jurisdictional effect of the existence of such a corporation, as regards the Federal Courts, is the same as that of a co-partnership of individual citizens residing in different states.* Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, *quo ad hoc* any property within its territorial jurisdiction. That this may be done was distinctly held in *The Ohio and Mississippi Railroad Co.* v. *Wheeler* (1 Black, 297). It is well settled that corporations of one state may exercise their faculties in another, so far, and on such terms, and to such extent as may be permitted by the latter. We hold that the case before us is within this latter category. The question is always one of legislative intent, and not of legislative power or legal possibility. So far as there is anything in the language of the court in the case of *The Ohio and Mississippi Railroad Co.* v. *Wheeler*, in conflict with what has been here said, IT IS INTENDED TO BE RESTRAINED AND QUALIFIED BY THIS OPINION."

Railroad Company v. *Harris*, 12 Wall., 65, at 82 (1870).

"The Maine Central Railroad Company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence. The fact that the powers, privileges, and immunities which they had possessed were conferred upon

the new company, so far as they could be exercised or enjoyed by it, in no respect affected its character as a distinct body. A new corporation may be as readily created by the union of two or more corporations as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration."

Railroad Co. v. *Maine*, 96 U. S., 499, at 510 (1877).

And the Supreme Court of Ohio, in the first controversy in which this defendant ever was interested, took the same view.

"Many difficulties have been suggested as arising, if a company, formed by the consolidation of an Ohio company with a company of another state, should be held to be a new corporation. We would have, it is claimed, the anomaly of a corporation with a capital stock, without the individual liability of the stockholders. The fallacy consists in the assumption, for such would not be the case. There has been some diversity of opinion as to the status of a corporation formed by the consolidation of companies under the laws of different states. But it seems pretty well settled upon principle at least, that *where formed under co-operative legislation of different states, it becomes a corporation in each state* where its road is located. It is a legal entity residing and doing business in different states, with a status in each, derived from and determined by the laws of that state. If by the laws of one of those states an individual liability attaches to the holder of stock in an incorporated company, the same liability will attach to its stockholders. The liability will, in this regard, depend upon the laws of the state, where it is sued. Whatever may be the holding in other states, there can be no doubt but that in Ohio the stockholders of an incorporated company, however formed, are individually liable

for its debts to the extent fixed by statute. The stockholders of the company in other states must be presumed to know what the Ohio law is in this regard; and by agreeing to consolidate with an Ohio company, must be presumed to assent to the individual liability attached by Ohio law to the ownership of stock in an Ohio company."

Ashley v. *Ryan*, 49 Ohio St., 504, at 529–30 (1892).

And this court affirmed the decision, expressing similar views.

"The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio."

* * * * *

"Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the

claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence."

* * * * *

"Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another State. The power of corporations of other States to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that State as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta* v. *Earle*, 13 Pet., 519; *Lafayette Insurance Co.* v. *French*, 18 How., 404; *Paul* v. *Virginia*, 8 Wall., 168, 181."

* * * * *

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio *upon the taking of corporate being or the exercise of corporate franchises*, the right to which depended solely on the will of that State, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

Ashley v. *Ryan*, 153 U. S., 436, at 440.

And see, also,

Louisville &c. Ry. Co. v. *Louisville Trust Co.*, 174 U. S., 552.

And such was the opinion entertained by Thayer, Circuit Judge, and Philips and Adams, District Judges, in a case in which the very question arose.

"It was conceded by both parties at the hearing that upon the completion of the agreement of consolidation the respective constituent corporations were dissolved and went out of legal existence, and *eo instante* the consolidated company, the Wabash Railroad Company, came into existence as a new corporation; and such is the law. *Shields* v. *Ohio*, 95 U. S., 319; *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S., 359; *Railway Company* v. *Berry*, 113 U. S., 465; *Railway Company* v. *Miller*, 114 U. S., 176; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S., 301; *State* v. *Keokuk & W. Ry. Co.*, 99 Mo., 30; *Evans* v. *Railway Co.*, 106 Mo., 601; *State* v. *Leuseur*, 145 Mo., 322.

"It must, we think, logically follow, that this new consolidated company has a legal existence in each of the States in which the constituent companies previously existed."

* * * * *

"Unless the consolidation agreement had provided for a compliance, and each company had complied, with all the essential requirements of the law of the respective states, the consolidation could not have become operative."

* * * * *

"The holding of this organization meeting in Ohio, rather than in St. Louis, where the board of directors of the new company have since usually held their meetings, was entirely optional; and in no legal sense was it essential for the transaction of the business in hand. It could not have the effect of fixing the situs of the corporation, as such corporation has a domicil in each of the states by which it is created; and the meeting and transaction of business in either state binds it everywhere. *Graham* v. *Railway Co.*, 118 U. S., 161."

Winn et al. v. *Wabash R. R. Co.*, 118 Fed., 55.

It is respectfully insisted that, *in such matters*, the rules of common law pleading in their strictness do not apply; and that two proper courses, *by plea*,

are open, viz.: to proceed by a common or general traverse, or by an affirmative plea, in the nature of a plea in abatement to the jurisdiction. And it is apparent that election between those courses must be determined upon consideration of whether the pleader desires to make the proof himself, or to call upon his adversary to make it. To the experienced lawyer, many reasons, unnecessary to be enumerated here, will at once suggest themselves, why he might often be unwilling to assume the risk and burden of standing ready to rebut whatever his adversary might show, and prefer rather to shorten his troubles by presenting brief, succinct and unanswerable evidence of the facts,—as to the existence of which, let it be observed, he must always hold the affirmative. The present case is an instance. Upon a general traverse in this case, the defendant would have the burden of proving a fales statement as to its incorporation, and the plaintiff, of repelling such evidence as the defendant might present. And if, upon that hearing, the truth should appear, it would be only incidentally, and not in support of any averment on the record.

In its last analysis the question is, may the pleader rely upon averments and proof of the truth, or must he rely upon his readiness and ability to overcome any showing which his adversary may make in support of false statements.

In conclusion upon this topic, it is submitted that, by analogy, authority, and reason alike, the correct method of disputing the jurisdiction of the Circuit Courts of the United States is by averring facts which, when admitted or proven, negative that jurisdiction.

The remaining, and, it is submitted, the only real question upon this record, is as to the citizenship, for the purposes of federal jurisdiction, of the defendant in error.

Reduced to simpler form, *having reference to federal jurisdiction alone*, the questions are:

(1) Whether, in view of the fact that the suit was brought in Illinois, the defendant is to be deemed a citizen of Illinois.

(2) Whether the defendant is, in all places to be deemed a citizen of each of the five states.

(3) Whether the defendant is to be deemed a citizen of Ohio, only.

If any one of the three questions be answered in the affirmative, the suit was not removable; since, in that event, it was not within the provisions of the acts of congress regulating the removal of causes.

If both of the first two questions shall be answered in the negative, the only averment of fact in the plea is, that the plaintiff is a citizen of Ohio. But, if that be true, the parties are citizens of the same state.

The law touching the jurisdiction of the courts of the United States, in so far as it depends upon diverse citizenship, has been both unfolded slowly, and, subject to modification. Nor, if it is true that law is but the refinement of reason, is either of those things to be wondered at; for there were no precedents, and that law is in fact still young.

At first, in cases of original cognizance, it was held that, on the general issue, averments of the citizenship of the parties had to be proven.

Then it was held that the question of jurisdiction could be put in issue only by a plea in abatement, as at common law.

And, by virtue of statutory modifications, it is now held, substantially, that it is necessary only that the facts showing want of jurisdiction be, in some way, and upon notice to the party to be affected thereby, made to appear on the record, and, that action by the court be requested thereon.

Morris v. *Gilmer*, 129 U. S., 315.
Anderson v. *Watt*, 138 U. S., 694, 701.
Wetmore v. *Rymer*, 169 U. S., 115.

At first it was held that corporations as such were without citizenship, but that the citizenship of the stock-holders was subject to averment and proof, and if when their citizenship was considered the requisite diversity existed, the court had jurisdiction.

Thereafter it was held that there was an indisputable presumption of law that all of the stock-holders of a corporation were citizens of the state under the law of which it was created.

And it is now held that no state law, whatever its provisions or however accepted, can, for such purposes, make a corporation existing under the laws of one state, a citizen of another state.

This court has spoken on the subject as follows:

> "We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted cor-

poration shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation.

"We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. *There we are content to leave it.*"

St. L. & S. F. Ry. Co. v. *James*, 161 U. S., 545, 562–3.

But it has said:

"We see no reason why several states cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one."

R. R. Co. v. *Harris*, 12 Wall., 65, 82.

And that view finds substantial support in the opinion of the court in the later case of *Louisville, &c., Ry. Co.* v. *Louisville Trust Co.*, 174, U. S. 552. And, indeed, would seem to be in accord with reason.

Can one corporation consolidate with itself alone?

If not, then it follows that the consolidation of the five to create the Wabash Railroad Company, was not merely a proceeding to change the names of the constituent companies so that they should all be alike.

Can one corporation consolidate with another, without legislative authority?

If not, then there had to be legislative authority from each of the five states. Legislation conferring authority on any one constituent company could not have conferred authority on any other. And if such authority had been wanting as to one, any attempt to consolidate would have been a nullity, for lack of power, authority or right on the part of that one to enter into an agreement of consolidation.

But if the consolidation was of the five companies, each acting under and by virtue of indispensable legislative authority from the state of its origin, it follows that the defendant company was created under and by virtue of the laws of the five states.

It must follow, either that the defendant is, for jurisdictional purposes, a citizen of each and all of the five states, like unto a co-partnership consisting of one or more citizens of each of those states, as stated by this court in its opinion in *R. R. Co.* v. *Harris*, 12 Wall., 65, 82, or else, that it is, as to each state alone, a citizen of that state only, and beyond the confines of the five states a "homeless citizen of the world."

Certainly, in any sixth state, it could not be held a citizen of any one of the five states, more than any other of them, while to hold it a citizen of all the five states when considered in a sixth, would be equally inconsistent, if the contrary doctrine is to prevail within the limits of the five states.

Although this court, in the case of *Bank of Augusta* v. *Earle*, 13 Pet., 519, declined, notwithstanding the powerful argument of Mr. Webster, to hold that corporations of one state, acting in another, do so in virtue of right, and held instead that it was matter of comity, and has since adhered to that doctrine; the fact re-

mains that corporations do act in states in which they never have been incorporated. They contract, buy and sell, loan and borrow, sue, and, at least in state courts, are subject to suit, in instances so numerous as to baffle the power of estimation. And this being so, the question of the citizenship, for the purposes of Federal jurisdiction, of such a corporation as the defendant in error here, may at any moment arise in a suit commenced beyond the territorial limits of the states of the creation of such a corporation, and be disputed before a Federal court. Suppose that question to have arisen after removal from a court of the State of New York, in a case in which the defendant in error here had sued a natural person, citizen of one of the five states. What would the citizenship of the corporation be? Again, suppose in such suit there were five defendants, all natural persons, and each a citizen of a different one of the five states. What would its citizenship be then? The law must be consistent and look to the future as well as the past.

Now, we may here pass over the difficulty that arises in defining the word "corporation"—a difficulty explainable by the indefiniteness of the concept which the word brings to the mind. (And, indeed, to most minds it brings none at all.) Let it be that the corporation is the invisible, intangible, so called entity, the fiction of a separate existence—the right of an ever changing and never ending multitude to be considered one. Does that simplify the question in the least? Because five support the same fiction, does it make it five separate fictions?

When it comes to the proof of existence of the corporation, what must it be? Not documents drawn in

the names of natural persons, but an agreement drawn in the names of, and subscribed by, five corporations, one of each of the five states named, providing for the consolidation of all their rights, privileges and franchises under a new and different name, the name of the defendant in error, and, for the filing of an original of that agreement with the Secretary of State of each of the five states, and, for the recording of a certified copy thereof in the office of the recorder of each county in Illinois, through or into which its lines run; and, that thereupon,

> "The said corporations, parties hereto shall be deemed and taken to be one corporation," and * * * "thereupon forthwith, all property, rights and franchises of whatever name or nature belonging to the parties of the first, second, third, fourth and fifth parts or either of them shall pass to and be vested in the said *new* corporation and the five named corporations shall forever cease and determine."

And it was so provided by the statutes of each of the five states.

The fiat went forth from each of five states at one and the same instant (the instant the consolidation was completed), that this multitude should be considered one person.

The characteristic features are the same in all of the states—perpetual succession, power to hold property, contract, sue and be sued, by the corporate name. It will not do to say that it was incorporated in any one of the five states sooner than in any other of them. *First*, because as we have already seen, it would then remain a citizen of that state only; *second*, because the agreement was to consolidate the five, not less. And it might well be that an agreement for the consolida-

iton of less than all would not have been acceptable. The minds of the accredited agents of the contracting constituent companies met (within what territorial jurisdiction, is unknown and immaterial), and all subsequent acts in furtherance of the incorporation of the defendant company were done in pursuance of that agreement and of the laws under which it was entered into. It was the making of that agreement, under the laws of all the five states, and the performance thereof conformably to the laws of all the five, that effected the creation of the defendant company. If that agreement had not been performed, possibly some of the contracting companies might have had ground for objection; but since it has been, there is none to object. All of the constituent companies have gone out of existence. There remain only the five states, the defendant company and its contracts with each of the five states severally. Now whatever those contracts may have been, it cannot be doubted that the defendant has ever since then, contracted as one corporation. Its acts and neglects bind it as a whole; and in most transitory actions, it may be sued in the courts of any state, and, upon proper service or appearance must answer as one corporation; and its entire property is liable for any judgment against it.

But it has been said that in order to give to each state its legitimate control of the rights which it has granted it is necessary to establish the fiction that such a company is a different corporation in each state. That theory would seem to rest upon two propositions: *First*, that there can be no co-operation between states, without some obligation to continue therein; and, that as the federal constitution forbids agreements or com-

pacts between the states, it therefore follows that they cannot co-operate. *Second*, that it is metaphysically impossible for states to co-operate in the creation of a corporation, otherwise than by compact or treaty; and that inasmuch as compacts and treaties between the states are prohibited by the federal constitution, it follows that they cannot co-operate in creating the same corporation. Upon this point, the Supreme Court of Michigan, speaking by COOLEY, J., said:

> "It is impossible to conceive of one joint act, performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty."
>
> *C. & N-W. Ry. Co. v. Auditor General*, 53 Mich., 79, 91.

Now it is apparent at a glance that the first proposition is based upon a fallacy. The obligation to continue is not a concomitant of co-operation. Further, this court has said (*Phila. &c. Ry. Co. v. Maryland*, 10 How., 392; *Railroad Co. v. Harris*, 12 Wall., 65) that states *may* co-operate in creating such a corporation. And later in *St. L. & S. F. Ry. Co. v. James*, 161 U. S., 545, 562, the court, speaking of a grant of authority by one state to a corporation of another state, and the acceptance thereof by such corporation, subject to rules and regulations imposed therein, said:

> "Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by congress, regarded as within the constitutional prohibition of agreements or compacts between states."

These cases are all in direct conflict with the first proposition.

As for the second proposition, the fallacy arises from reasoning in too close analogy to tangible things. It is undoubtedly true that the mind cannot conceive of five, each alone, creating the same thing. But it should be observed that neither the idea of creation, nor that of paternity, is, in any proper sense, involved in the organization of a corporation. It is not an entity—only a fiction, the contradiction of which is forbidden by law. To attempt to *materialize it* is to attempt the impossible and absurd. We may, however, properly inquire by what law or laws it was authorized. Now the legislative acts authorizing consolidation all did, and in the very nature of things must have contemplated, as a pre-requisite to the creation of the consolidated company, the granting of legislative authority for consolidation, by each of the other states whose corporations should become parties to the agreement of consolidation, the making and filing of which conformably to the law of all should under those laws effect the creation of the new company. It is impossible to controvert, nay, the necessities of law arising from the very nature of the transaction *require*, that the legislative mind should have contemplated the co-operation of the legislative power of each of the other states whose creatures were to become parties to the consolidation agreement. Under no other circumstances would it be possible to create such a corporation. Upon every other legal theory whatever, every conceivable state statute for the creation of a corporation by the consolidation of a corporation or corporations of that state with a corporation or corporations of another state or other states, would be meaningless.

Again, it should be noted that we have been inquiring as to the correct legal theory to be put upon that

which was done, not, whether it was done. As to that, there neither is nor can be any dispute. If a corporation cannot be created so, it must follow that the defendant in error was not legally incorporated.

In attempting to explain the fiction according to the laws of metaphysics, it is proper to remember that the necessity was occasioned by the presumption established, that a state corporation is a citizen of the state which created it. Later, speaking of that presumption, the court has said:

> "We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal courts at the suit of a citizen of the state of its original creation.
>
> "We are unwilling to sanction such an extension of a doctrine, which, as heretofore established, *went to the very verge of judicial power*. The doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

St. L. & S. F. Ry. Co. v. *James*, 161 U. S., 545, 562-3.

And that language was quoted to the same point in the court's opinion in the later case of *Southern Ry. Co. v. Allison*, 190 U. S., 326, 335.

But to hold that a consolidated corporation created under the laws of several states is, in each of those states, a citizen of that state alone, is not only to enlarge the presumption, but to do violence to the facts. The first presumption might well be true, and, indeed, to this day often is true; but the second, is in direct conflict with inevitable necessity. The corporation cannot at one and the same time be composed entirely of citizens of each of five states. Nor, as we have seen, was it in truth created by the law of any one state, so that it could be fairly said to be the creature of that state.

The language of the agreement and of the laws under and by virtue of which it was made all speak co-operation as plainly as it can be spoken.

The Michigan case just cited seems to hold that such a thing is metaphysically impossible otherwise than by agreement, but quite possible by agreement. Again an attempt to materialize the "entity."

But whether the view entertained by the Michigan court be true or not, it is submitted that this court's decision in such matters should be governed by the first clause of section 2, of article IV of the constitution, viz.:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

In one of the earliest cases touching the question, this court, in its opinion, said:

"By the constitution, the jurisdiction of the courts of the United States is declared to extend, *inter alia*, to 'controversies between citizens of different states.' The judiciary act confers on the Circuit Courts jurisdiction 'in suits between a citizen of the state where the suit is brought and a citizen of another state.'

The reasons for conferring this jurisdiction on the courts of the United States, are thus correctly stated by a contemporary writer (Federalist, No. 80): 'It may be esteemed the basis of the union, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." And if it be a just principle that every government *ought to possess the means of executing its own provisions, by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.' Now, if this be a right, or privilege guaranteed by the constitution to citizens of one state in their controversies with citizens of another, it is plain that it cannot be taken away from the plaintiff by any legislation of the state in which the defendant resides."

Marshall v. *B. & O. R. R. Co.*, 16 How., 316, 326.

But it is not, in this case, at least, the legislation of the state in which the suit is brought, but that of the plaintiff's own state which by authorizing incorporation removes diversity of citizenship.

Why should a citizen of the five states have the right upon the ground of diverse citizenship, to remove a a suit brought against him by such a corporation in the courts of another of the five states? If the five original companies had brought such a suit, there

would be no attempt to remove. The five states each acted in the creation of the defendant in error. The question is for this court. Many cases might be cited from state courts and the federal Circuit Courts, but it is believed that they would be of little service to this court. The following are among those that have dealt with the question:

Pac. Ry. Co. v. *Mo. Pac. Ry. Co.*, 23 Fed., 565.
Uphoff v. *Chi., etc., R. Co.*, 5 Fed., 545.
Fitzgerald v. *Mo. Pac. Ry. Co.*, 45 Fed., 812.
Johnson v. *W. & B. R. Co.*, 9 Fed., 6.
B. & O. R. Co. v. *P. W. & K. R. Co.*, 17 W. Va., 812.
Henen, Admr., v. *B. & O. R. Co.*, 17 W. Va., 81, 899.
Shaw v. *Covington*, 194 U. S., 393.
Brockett v. *Ohio R. Co.*, 14 Pa. St., 244.
Nashua R. Co. v. *Lowell R. Co.*, 136 U. S., 356.
O. & M. R. Co. v. *Wheeler*, 1 Black, 286.
Farnham v. *Canal Co.*, 1 Sumner, 47.
Mower v. *Kemp*, 42 La. Ann., 1,007.
R. & M. R. Co. v. *Farmers' L. & T. Co.*, 49 Ill., 331.
C. & N.-W. Ry. Co. v. *Aud. Gen.*, 53 Mich., 79, 91.
Market St. R. Co. v. *Hellman*, 109 Cal., 571.

Two cases, and only two, which may be said to have dealt with the question, have been heard in this court. They are *Whitton, Admr.*, v. *C. & N.-W. Ry. Co.*, 13 Wall., 270, and *Muller* v. *Dows*, 94 U. S., 444. In the first it does not appear (as this court observed in its

opinion in *Ry. Co.* v. *James*) what was the nature of the legislation by which the company was incorporated in the different states. In the brief of Mr. De Costa, counsel for the appellant in the case of *Muller* v. *Dows*, it is said that the former case was an instance of incorporation in different states and not of consolidation. The *Dows* case would seem to have been decided on the authority of the former one. The question would therefore seem to be unsettled.

It is to be observed that in the present case the several constituent companies are not separate companies or component parts of the new corporation. There was "created" a corporation, under and by virtue of the laws of the States of Illinois, Missouri, Indiana, Michigan and Ohio, a new corporation.

There is certainly ground in *O. & M. Ry. Co.* v. *Wheeler*, 1 Black., 286, *Phila. &c., Ry. Co.* v. *Maryland*, 10 How., 392, *R. R. Co.* v. *Harris*, 12 Wall., 65, and *Louisville R. Co.* v. *Louisville Trust Co.*, 174 U. S., 552, for the contention that such a company is a citizen of each and all of the states of its incorporation, like unto a co-partnership consisting of one or more natural persons from each of those states, precisely as this court said in the *Harris* case.

But if this court, in construing the constitutional guaranty, shall hold that in each state the company is a citizen of that state only, leaving the question of its citizenship beyond the five states open, it will still remain that the defendant is a citizen of Illinois. The facts alleged are the ultimate facts which must appear in evidence upon a hearing on the question, and, therefore, whatever the citizenship of the defendant may be, it must arise thereon.

But if the constitution or reason, or both, forbid that a corporation be created so, it still remains to be noticed that the plaintiff is a citizen of Ohio.

In conclusion it is contended that the learned judge below was clearly in error, and that the judgment should be reversed and the cause remanded, with directions according to law.

Respectfully submitted.

GEORGE C. OTTO,
Counsel for Plaintiff in Error.

APPENDIX.

Constitution of Illinois (in force since August 8, 1870):

ARTICLE XI.

SEC. 1. "No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

SEC. 11. "No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice given, of at least sixty days, to all stockholders, in such manner as may be provided by law. A MAJORITY OF THE DIRECTORS OF ANY RAILROAD CORPORATION, NOW INCORPORATED OR HEREAFTER TO BE INCORPORATED BY THE LAWS OF THIS STATE, SHALL BE CITIZENS AND RESIDENTS OF THIS STATE."

AN ACT *to provide for the consolidation of certain railroad corporations*. Approved June 14, 1883. In force July 1, 1883. L. 1883, p. 124:

SEC. 1. "*Be it enacted by the People of the State of Illinois, represented in the General Assembly*. Whenever any railroad which is situated partly in this state, and partly in one or more other states, and heretofore owned by a corporation formed by consolidation of railroad

corporations of this and other states, has been sold pursuant to the degree of any court or courts of competent jurisdiction, and the same has been purchased as an entirety, and is now, or hereafter may be, held in the name or as the property of two or more corporations incorporated respectively under the laws of two or more of the states in which said railroad is situated, *it shall be lawful* for the corporation so created in this state *to consolidate* its property, franchises and capital stock *with* the property, franchises and capital stock of *the corporation or corporations of such other state or states* in which the remainder of such railroad is situated, and *upon such terms as may be agreed upon between the directors, and approved by the stockholders owning not less than two-thirds* in amount of the capital stock of such corporations. Such approval may be given by the stockholders of such corporation of this state at any time, in writing or by vote, at any annual or special meeting, upon sixty days' notice given by publication in any newspaper published in the county where the general office of such company is situated, and such meeting is to be held: *Provided*, that no consolidation shall take place with any railroad owning a parallel or competing line; and a majority of the directors of SUCH CONSOLIDATED COMPANY sha'l be citizens and residents of this state; and where the line of the road of the original company has been located in this state, and aid in the construction thereof voted by any municipality by way of subscription or donation, and received by the company, and the road as so located not yet completed, then the consolidated company shall have no power or right to change such line as so located so as to make the same substantially different from the line so located at the time the aid was voted."

SEC. 2. "Such consolidation shall take effect upon the filing and recording of such articles of

conso'idation in the office of the Secretary of State of the State of Illinois, and a certified copy thereof in the office of the recorder of the various counties in which said railroad is situated. A certified copy of such articles of consolidation, under seal of the Secretary of State, shall be deemed and taken to be *prima facie* evidence of the existence of SUCH CONSOLIDATED CORPORATION."

SEC. 3. "SUCH CONSOLIDATED CORPORATION shall, at all times, keep a general office within this state, at which shall be kept a complete list of all stockholders of SUCH CORPORATIONS, their p'aces of residence, the amount of stock owned by each, and where the stock of such corporation may be registered and transferred: *Provided*, that nothing contained in this bill shall be construed to impair or affect the rights of any party holding unsettled claims against any of the corporations to be consolidated."

Starr & Curtis' Ann. Ill. Stat., Vol. 3, p. 3241 (2nd Ed.).

Hurd's Stat., Ch. 114, Secs. 39-41.

Constitution of Missouri (in force November 30, 1875):

ARTICLE XII.

SEC. 2. "No corporation, after the adoption of this constitution, shall be created by special laws; nor shall any existing charter be extended, changed or amended by special laws, except those for charitable, penal or reformatory purposes, which are under the patronage and control of the state."

SEC. 18. "If any railroad company organized under the laws of this state shall consolidate, by

cepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated."

"SEC. 1060. MAY AID OTHER RAILROADS, ON WHAT TERMS.—Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purposes of forming a connection of the last mentioned road with the road owned by the company furnishing such aid, or any such railroad company which may have built its road to the boundary lines of the state may extend into the adjoining state, and for that purpose may build, buy, lease or consolidate, in the manner provided in the preceding section, with any railroads in such adjoining state, and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of such companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed

upon between said companies respectively; or any railroad company duly incorporated and existing under the laws of any state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon rai road corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations, as fully as if incorporated in this state; provided, that no such aid shall be furnished, nor any purchase, lease, subletting or arrangements perfected until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sublet, consolidated or affected by such arrangements, shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' public notice thereof having been previously given and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto or until the holders of a majority of the stock of such company shall have assented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies, sha'l have been filed in the office of the Secretary or State; and provided, further, that if a railroad company of another state shall 'ease a railroad, the whole or a part of which is in this state, or make arrangements for operating the same as provided in this act, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state leasing its road

to a corporation of another state, or licensing or permitting a corporation of another state, under any running arrangement, to run engines and cars upon its road in this state, shall remain liable as if it operated the road itself; and a corporation of another state, being a lessee of a railroad in this state, or running its engines and cars upon a railroad in this state under a license, permit, or running agreement, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued in all cases and for the same causes, and in the same manner as a corporation of this state might sue or be sued if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state, being the lessee as aforesaid, or extending its railroad as aforesaid into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state."

Constitution of Indiana (in force November 1, 1851):

ARTICLE XI.

SEC. 13. "Corporations, other than banking, shall not be created by special act, but may be formed under general laws."

* * * * *

"AN ACT *to authorize Railroad companies to consolidate their stock with the stock of railroad companies in this or in an adjoining state, and to con-*

nect their roads with the roads of said companies, and to authorize railroad companies to construct their roads on the routes which they may have heretofore surveyed and located, and to use and occupy the same when completed. (Approved February 23, 1853.)" L. of Ind. 1853, p. 105:

SECTION 1. "*Be it enacted by the General Assembly of the State of Indiana:* That any railroad company heretofore organized under the general or special laws of this state, shall have the power to intersect, join, and unite their railroad with any other railroad constructed or in progress of construction in this state, or in any adjoining state, at such point on the state line, or at any other point, as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint-stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state with whose road or roads connections are thus formed: *Provided*, their charters authorize said railroads to go to the state line, or to such point of intersection."

* * * * *

"AN ACT *to explain an act entitled 'an act authorizing railroad companies to consolidate their stock with the stock of railroad companies in this or an adjoining state, and to connect their roads with roads of said companies, and to authorize railroad companies to construct their roads on the routes which they may have heretofore surveyed and located, and to use and occupy the same when completed,'* approved February 23, 1853. (Approved March 4, 1853.)" L. of Ind. 1853, p. 107:

SECTION 1. "*Be it enacted by the General*

Assembly of the State of Indiana: That the provisions of the first section of the act above recited were intended to apply to railroads hereafter organized as well as to those heretofore organized, and it shall and may be lawful for railroad companies hereafter organized under the laws of this or any adjoining state, as well as those heretofore organized, to consolidate and make their stock joint stock with any other railroad company heretofore or hereafter organized as aforesaid, on the terms and conditions and subject to all the restrictions as stated in said act."

See:

Bradford v. *The Frankfort, St. Louis & Toledo R. R. Co. et al.*, 142 Ind., 383, at 390.

Constitution of Michigan (adopted in 1850; in force since January 1, 1851):

ARTICLE XV.

SECTION 1. "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed. But the legislature may, by a vote of two-thirds of the members elected to each house, create a single bank with branches."

* * * * *

Laws of Michigan, 1873, Vol. 1, p. 521.

SEC. 29. "Any railroad company in this state, forming continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this

state, or partly within and partly without this state, into a single corporation: *Provided*, that no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation. The directors of said two or more corporations may enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the number of the directors thereof, and the names of those who shall be the first directors, which shall be deemed and taken to be the first election of the directors of the consolidated company; which number shall not be less than five, nor more than fifteen; the time and place of holding the first election of directors after the consolidation, which time shall not exceed six months after such consolidation has been sanctioned by the stockholders of said two or more corporations, as hereinafter provided; the number of shares of capital stock in the new corporation; the amount of each share; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation; with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations; and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters, or laws of organization, not inconsistent with the provisions of this act. Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations until after it has been submitted to the stockholders of each of said corporations separately, at a meeting thereof, to be called upon a notice by publication at least once in

each week for four successive weeks, in one of the daily papers published in the City of Detroit, and some newspaper published in each county in this state through which said roads run, in which a newspaper shall be published; the first publication to be at least sixty days before the time specified for said meeting, and signed by the secretaries of each of said companies proposing to consolidate, stating the purpose and object of said meeting, and has been sanctioned by such stockholders by a vote of a majority in interest of the stockholders, in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders separately, in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations. A copy of said contract or consolidation agreement filed in pursuance of this act, or of an act entitled, 'An Act to provide for the incorporation of railroad companies,' approved February twelve, eighteen hundred and fifty-five, and the acts amendatory thereof, and the acts amending or revising the same, with the Secretary of State, and certified by him to be a copy, shall in all courts and places be presumptive evidence of the consolidation of said two or more companies, and of all the facts therein stated: *And provided*, that any railroad bridge company, or railroad tunnel company, which may be organized under this act to bridge or tunnel the Detroit river, or the St. Clair, or any of the waters in the jurisdiction of this state, shall have the right to consolidate the stock, property and assets of said company with the stock, property and assets of any company organized or to be organized under the laws of this state, or which may be created under the laws of any adjacent state or country, to construct any such bridge or tunnel there-

with, upon such terms, conditions and agreements as may by the said two corporations be deemed just and equitable: *Provided*, that every such bridge or tunnel shall be so constructed as not to be a material obstruction to navigation."

* * * * *

Public Acts of Michigan, 1883, p. 187.

SEC. 30. "Before the agreement mentioned in the preceding section (Sec. 29) shall have any force or effect, and before filing a duplicate thereof in the office of the Secretary of State, the articles of consolidation shall be submitted to a board, consisting of the attorney general, commissioner of railroads, and secretary of state, to be examined by such board, to ascertain whether the proposed consolidation will be in accordance with the constitution and laws of this state, and if found in accordance therewith, said board shall approve the same. Upon such approval by said board a duplicate of the articles of agreement shall be filed in the office of the Secretary of State, the said two or more corporations, mentioned or referred to in this section, shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein. And all and singular, the rights and franchises of each and all of said two or more corporations, parties to such agreement, and all and singular, their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way, and all other rights of property, in the same manner and to the same intent, as if said two or more corporations, parties to such agreement, should have continued to retain the title and

transact the business of such corporation, and the titles and real estate acquired by either of said two or more corporations shall not be deemed to revert or be impaired by means of anything in this act contained: *Provided*, that all rights of creditors, and all liens upon the property of either of said corporations, parties to the said agreement, shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same: *And provided, further*, that all the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it."

Constitution of Ohio (in force since September 1, 1851):

ARTICLE XIII.

SECTION 1. "The general assembly shall pass no special act conferring corporate powers."

SEC. 2. "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

Revised Statutes of Ohio. (Smith & Benedict, 1890.) Vol. 1, Tit. II, Ch. 2:

SECTION 3380. "A company organized in this state for the purpose of constructing, owning and operating a line of railway, or whose line of road is made or is in process of construction to the boundary line of the state, or to any point either in or out of the state, may consolidate its capital stock with the capital stock of any com-

pany in an adjoining state, organized for a like purpose, and whose line of road has been projected, constructed or is in process of construction to the same point where the several roads so united and constructed will form a continuous line for the passage of cars, and roads running, or to be constructed to the bank of a river which is not bridged, shall be held to be continuous under this section. [1885, April 22; 82 v. 150; Rev. Stat. 1880; 74 v. 71, Sec. 1; (S. & C. 280; S. & C. 327).]"

SEC. 3381. "The consolidations shall be made under the conditions and restrictions following:

1. The directors of the several companies may enter into a joint agreement, under the corporate seal of each company, for the consolidation of the companies, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new company, the number of directors and other officers thereof, and their places of residence; the amount of the capital stock of the new company agreed upon; the number of shares of capital stock; the amount of each share and the manner of converting the capital stock of each of the constituent companies into that of the new company, with such other details as they may deem necessary to perfect the new organization and the consolidation of the companies.

2. The agreement shall be submitted to the stockholders of each of the companies at a meeting thereof called separately for the purpose of taking the same into consideration; due notice of the time and place of holding such meeting, and the object thereof, shall be given by written or printed notices addressed to each of the persons in whose names the capital stock of the companies stands on the books thereof, and also by a like notice published in some newspaper in the city or town where such company has its principal office or place of business; provided,

that in case all the stockholders are present at such meeting, in person or by proxy, such notice may be waived in writing. At the meeting of stockholders the agreement of the directors shall be considered, and a vote by ballot taken for the adoption or rejection of the same, each share of stock on which has been paid all the installments called for by the board of directors, entitling the holder thereof to one vote; the ballots shall be cast in person or by proxy, and if two-thirds of all the votes cast at the meeting be for the adoption of the agreement, that fact shall be certified thereon by the secretary of each of the companies, and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the Secretary of State. And all consolidation agreements heretofore entered into and ratified by such companies substantially in manner as in this section prescribed, shall be as valid as if entered into and ratified by virtue of this section. [1885, April 22: 82 v. 150; Rev. Stat. 1880; 74 v. 71, Sec. 2; (S. & C. 280; S. & C. 327).]"

SEC. 3382. "When the agreement is made and perfected, as provided in the preceding section, and the same or a copy thereof filed with the Secretary of State, the several companies parties thereto shall be deemed and taken to be one company, possessing within this state all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of a railroad company. [53 v. 143, Sec. 3; S. & C. 327.]"

SEC. 3383. "The stockholders at the meeting called to take into consideration the agreement shall, after the adoption of the same, appoint a time and place for the election of the directors and other officers of the new company, notice of which shall be given by the secretary of each of the companies in some newspaper printed, or of general circulation at the place of the principal office of each company, at least

three weeks previous thereto; provided, that if at such meeting all the stockholders of the constituent companies are present, either in person or by proxy, they may, in writing or by resolution, waive such notice, and consent to hold such meeting and election at any time, which election shall be conducted in such manner as may be prescribed by the stockholders at such meeting. [1885, April 22: 82 v. 150, 151; Rev. Stat. 1880; 53 v. 143, Sec. 4; (S. & C. 328).]"

SEC. 3384. "Upon the election of the first board of directors of the company created by the agreement of consolidation, all and singular the rights, privileges and franchises of each of the companies to the agreement, and all the property, real, personal and mixed, and debts due on account of subscriptions of stock, or other things in action, shall be deemed to be transferred to and vested in such new company, without further act or deed; all property, rights of way and other interests, shall be as effectually the property of the new company as they were of the companies parties to the agreement; the title to real estate, either by deed, gift, grant, or by appropriations under the laws of this state, shall not be deemed to revert or be impaired by reason of the consolidation; but all rights of creditors, and all liens upon the property of either of such companies, shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same and all debts, liabilities and duties of either of said companies, shall thenceforth attach to the new company, and be enforced against it to the same extent as if such debts, liabilities and duties had been contracted by it. [53 v. 143, Sec. 5; S. & C. 328.]"

SEC. 3385. "The new company shall, as soon as convenient after the consolidation, establish a principal office at some point in this state on the line of its road, and may change the same at

pleasure; but public notice of such establishment or change shall be given in some newspaper. [53 v. 143, Sec. 6; S. & C. 328.]"

SEC. 3386. "Suits may be brought and maintained against the new company in the courts of this state, for all causes of action, in the same manner as against other companies. [53 v. 143, Sec. 7; S. & C. 328.]"

SEC. 3387. "That portion of the road of such consolidated company in this state, and all its real and personal property, shall be listed for taxation and taxed in the same manner as the road and property of other railroad companies in this state; and to ascertain the proportion of the rolling machinery subject to taxation in this state, the officer listing the same shall ascertain the value of all the rolling machinery of the company, and return a sum bearing such proportion to the value of the whole, as the length of the line of such road in this state bears to the length of the whole line. [53 v. 143, Sec. 8; S. & C. 328.]"

SEC. 3388. "A stockholder who refuses to convert his stock into the stock of the consolidated company shall be paid the highest market value of such stock at any time within six months next preceding the time of the making of such agreement for consolidation by the directors, if, previous to such consolidation, he so require; and if a stockholder so refusing to consolidate, and the board of directors of the company desiring to consolidate, cannot agree as to the value of such stock, the parties may submit the question to arbitration, which arbitration shall be conducted in accordance with the law regulating arbitrations, so far as the same may be applicable, by three disinterested persons, to be appointed upon the motion of either of the parties, by the judge of the court of common pleas of the county in which the person owning the stock resides, or, in case he is a non-resident of any county through or into

which the road passes, then in the county in which the principal office of the company is kept. [53 v. 143, Sec. 10; S. & C. 329.]"

SEC. 3389. "If a person so refusing to convert his stock refuse to submit the question to arbitration, the proper judge shall, upon the application of any director of either of the companies desiring to consolidate, appoint the arbitrators, who shall proceed to ascertain the value of the stock the same as if the question had been submitted by the consent of both parties; and if the party owning the stock refuse to receive the amount awarded in any case, the company may deposit the same with the clerk of the Court of Common Pleas of the county in which the arbitration is held, which deposit shall authorize the parties to proceed to consolidate without further payment to such stockholder. [53 v. 143, Sec. 10; S. & C. 329.]"

SEC. 3390. "In all such cases of arbitration the party desiring the arbitration shall give the opposite party at least ten days' notice of his intention to apply to the judge for the appointment of arbitrators, which notice shall be served in the same manner as is provided for the service of a summons, and shall specify the time and place of the hearing of the application; and in cases of non-residents the notice shall be by publication, for four consecutive weeks, in some newspaper printed in the county. [53 v. 143, Sec. 11; S. & C. 329.]"

SEC. 3391. "A copy of the agreement and act of consolidation, duly certified by the Secretary of State, shall be received in the courts of this state as *prima facie* evidence of the existence of the several companies parties to the agreement, prior to and at the time of the execution of the agreement, of the consolidation of the companies, as specified in the agreement, that such consolidation was authorized by the laws of the several states within which the several companies were chartered, and into which

the consolidated road extends, and of all and singular the facts, statements and covenants set forth and recited in the agreement and act of consolidation, and in the certificates indorsed thereon. [55 v. 8, Sec. 1; S. & C. 329.]"

SEC. 3392. "It shall not be necessary to produce or prove the charters of the companies parties to such consolidation, the laws of the several states under and by virtue of which such consolidation was effected, or the original articles of consolidation, in any suit brought to charge such consolidated company with any liability of either of the companies parties to the act of consolidation, any law or custom to the contrary notwithstanding. [55 v. 8, Sec. 2; S. & C. 330.]"

THIS AGREEMENT, entered into by and between THE TOLEDO WESTERN RAILROAD COMPANY, a corporation of the State of Ohio, party of the first part; THE DETROIT AND STATE LINE WABASH RAILROAD COMPANY, a corporation of the State of Michigan, party of the second part; THE WABASH EASTERN RAILWAY COMPANY OF INDIANA, a corporation of the State of Indiana, party of the third part; THE WABASH EASTERN RAILWAY COMPANY OF ILLINOIS, a corporation of the State of Illinois, party of the fourth part; THE WABASH WESTERN RAILWAY COMPANY, a corporation of the State of Missouri, party of the fifth part, WITNESSETH:

THAT WHEREAS, the Wabash, St. Louis and Pacific Railway Company was a consolidated Railway Corporation, composed of Constituent Corporations organized under the laws of the States of Ohio, Indiana, Illinois, Missouri and Michigan, and as such owned a system of connected railway lines extending from Toledo, Ohio, and Detroit, Michigan, on the east, to St. Louis and Kansas City, Missouri, and to Chicago, Illinois, on the west, said system and lines of railway composing the same being hereinafter more particularly described and in detail set forth.

AND WHEREAS, the said Wabash, St. Louis and Pacific Railway Company, on or about the 1st day of June, 1880, duly executed and delivered its General Mortgage to the Central Trust Company of New York and James Cheney, Trustees, and issued and sold under said General Mortgage seventeen million of its general mortgage bonds, and subsequently thereto, to wit, on or about the 1st day of June, 1884, said Wabash, St. Louis and Pacific Railway

Company defaulted in the payment of interest upon the said bonds, and also on or shortly after said date upon bonds issued by various Railway Corporations predecessors to it in the ownership of lines of railway then owned by it and all of which were secured by mortgages or deeds of trust upon lines of railway held by said companies and herein described.

And whereas, subsequently to said default and in consequence thereof, proceedings were had for the foreclosure of said general mortgage in the United States Circuit Courts for the Eastern District of Missouri, for the Southern District of Illinois, for the District of Indiana, for the Northern District of Ohio, Western Division, for the Eastern District of Michigan, and in said foreclosure proceedings, under a plan of reorganization entered into on or about the 15th day of July, 1885, by the holders of bonds secured by said General and Collateral Trust Mortgages executed by said company upon its said lines of railway and other property, Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles were, by agreement of said bondholders, duly constituted a purchasing committee to purchase said railways and did, at the sale of said systems of railways, purchase the same as an entirety subject to all mortgages thereon prior to said general mortgage.

And whereas, subsequently thereto, to wit, on or about the ..... day of ....., 188.., the said Orrian D. Ashley, James F. Joy, Thomas H Hubbard and Edgar T. Welles, purchasing committee, did, in furtherance of said plan of reorganization, cause to be organized the Wabash Western

Railway Company, party of the fifth part, and did thereafter, and on or about the 30th day of September, 1887, duly convey to said corporation the following described lines of railway situated within the State of Missouri, formerly belonging to said Wabash, St. Louis and Pacific Railway Company, to wit, all the right of way of railroads formerly of the said The Wabash, St. Louis and Pacific Railway Company, extending from the City of St. Louis, in the State of Missouri, to Kansas City, Missouri, with an extension from Moberly, Missouri, to the state line of Iowa, and a branch from Salisbury, Missouri, to Glasgow, Missouri, together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water tanks and fixture shops, engines and other houses, depots, turn tables, engines, cars, machinery, tools, ferry and other boats, depot grounds, real estate pertaining thereto or belonging to said company at any of the terminals thereof, franchises, rights, interests and property, and everything appurtenant to said railroad or used in connection therewith, together with all rents, issues, profits, credits and choses in action accruing from said railroad and appurtenances, and also the real estate taken in the name of James F. How, as trustee for said company in St. Louis, Missouri, the right to use the bridge over the Missouri River at Kansas City, Missouri; the right to use certain tracks and depot facilities in the Union Depot in Kansas City, Missouri; the right to use certain tracks and depot facilities in the Union Depot at Hannibal, Missouri, and also the leasehold interests formerly of The Wabash, St. Louis and Pacific Rail-

way Company in the following railways and properties, to wit: Boone County and Booneville Railway, extending from Centralia to Columbia, in the State of Missouri; Brunswick and Chillicothe Railway, extending from Brunswick to Chillicothe, in the State of Missouri; The St. Louis, Council Bluffs and Omaha Railway, extending from Chillicothe to Elm Flats, in the State of Missouri; the bridge over the Mississippi River at St. Louis, with tunnel and terminal rights in said city bridge over the Mississippi River at Hannibal, Missouri; also certain lands and lots adjacent to the lines of railroad aforesaid in Missouri, and particularly described in the report of the special master bearing date December 29, 1885, and filed in said cause, the title to which lands and lots was acquired by the receiver in said cause in the name of James F. How, trustee.

And the said corporations now own and control the same.

And whereas, subsequent to the said sale of said railway properties under said general mortgage, a further agreement of reorganization was entered into by holders of bonds issued under all the mortgages upon said lines of railway and under said agreement bearing date November 21, 1887, said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles were likewise constituted a purchasing committee on behalf of the holders of bonds issued under all said mortgages and were duly authorized to foreclose all the mortgages upon the lines of railway formerly belonging to the Wabash, St. Louis and Pacific Railway Company east of the Mississippi River and to reorganize the same and

to organize a new consolidated corporation with authority to issue new mortgage bonds covering all said lines of railway for exchange for bonds outstanding upon said lines of railway as in said last named agreement fully set forth.

And whereas, said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, acting under said agreement, did cause to be organized under the laws of Michigan The Detroit and State Line Wabash Railroad Company, and did, on the 13th day of March, 1889, duly convey to said corporation thus formed the following railway lines, to wit:

The railroad formerly designated as The Detroit, Butler and St. Louis Railroad, and which thereafter became by purchase and consolidation a portion of the Wabash, St. Louis and Pacific Railroad, extending from a point on the Detroit, Grand Haven and Milwaukee Railroad, near or at Detroit, where the said railroad formerly designated as The Detroit, Butler and St. Louis Railroad, as aforesaid, intersects the same and running thence in a generally southwestern direction through the counties of Wayne, Washtenaw, Monroe and Lenawee, in Michigan, and the counties of Fulton and Williams, in Ohio, and the County of De Kalb, in Indiana, to Butler, in the last named state, and the said corporation now owns and controls the said line of railway.

And whereas, in the carrying out of the said agreement of reorganization of November 21, 1887, the said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, purchasing com-

mittee, caused such proceedings to be had that in suit of James R. Jessup and Edward H. Dixon, trustees, *vs.* The Wabash, St. Louis and Pacific Railroad Company and others, brought in the United States Circuit Court for the Southern District of Illinois; for the District of Indiana; for the Northern District of Ohio, Western Division, all the mortgages upon the lines of railway formerly belonging to the Wabash, St. Louis and Pacific Railway Company each of the Mississippi River, and hereinafter more particularly described, were foreclosed, and all of said railway lines in the States of Ohio, Indiana and Illinois, save and except the Chicago and Detroit Divisions, were, on the 15th day of May, 1889, at the sale held under the foreclosure decree entered in said clause, purchased as an entirety by said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles, as a purchasing committee, and in the suit of John F. Terry and Henry F. Spaulding *vs.* James F. Joy *et al.*, pending in the United States Circuit Court for the Southern District of Illinois, said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles did, on the 11th day of March, 1889, also purchase at the foreclosure sale in said cause the line of railway known as the Chicago Division and did receive due conveyance therefor, and said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles did subsequently to such sale and on or about the 23rd day of May, 1889, duly convey to the Wabash Eastern Railway Company of Illinois, party of the fourth part, a corporation organized by them for that purpose under the laws of the State of Illinois, the following lines of railway, to wit:

The line of railway formerly known as the Great Western Railway, of 1859, and extending in the State of Illinois from Naples and Meredosia, as its western termini, through Springfield and Decatur to the boundary line between the States of Indiana and Illinois.

The line of railway formerly known as the Illinois and Southern Iowa Railroad, and being and situate between the towns of Carthage, in Hancock County, and the Junction with the Quincy and Toledo Railroad, at or near Clayton, in Adams County, Illinois; the branch extending from Clayton to Camp Point; the branch extending from Carthage to Elvaston.

The line of railway formerly known as the Decatur and East St. Louis Railway, and extending from Decatur, Macon County, Illinois, to the Mississippi River, at or near East St. Louis.

The line of railway formerly known as the Quincy and Toledo Railroad, extending from Clayton to the west side of the Illinois River, opposite Meredosia.

The line of railway formerly known as The Hannibal and Naples Railroad, and extending from Naples, Scott County, Illinois, to the Mississippi River, at East Hannibal.

The line of railway formerly known as the Chicago Division of the Wabash, St. Louis and Pacific Railway Company and commencing at Effingham, in the County of Effingham, in the State of Illinois, and extending thence northwardly through the Counties of Effingham, Shelby, Moultrie, Piatt,

Champaign, McLean, Ford and Livington to Streator, in the County of La Salle, in said state, with a branch or extension thereof from Shumway to Altamont, in the County of Effingham aforesaid. The said line of railroad being the same formerly belonging to the Chicago and Paducah Railroad; also the railroad commencing at Strawn, in the County of Livingston, in said State of Illinois, and extending thence northeastwardly through the Counties of Livingston, Kankakee and Will, to or near the City of Chicago, in the County of Cook, and known as the Chicago and Strawn Railway, together with all the terminal rights in the City of Chicago and all equipment and all property rights and franchises appurtenant to each and all of said lines of railway.

All of which lines the said corporation now owns and controls.

And whereas, the said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles did also cause to be organized under the laws of the State of Indiana the Wabash Eastern Railway Company of Indiana, party of the third part, and did on or about the 23rd day of May, 1889, duly convey to said corporations thus organized by them the following lines of railway, purchased by them, to wit: The line of railway in the State of Indiana extending from the east line of Allen County to the west line of Warren County in said state and being the line of railway forming a part of the main line of what is known as the Wabash Railway and said corporation now owns and controls the same.

And whereas, the said Orrian D. Ashley, James F. Joy, Thomas H. Hubbard and Edgar T. Welles did also cause to be organized The Toledo Western Rai road Company, party of the first part under the laws of the State of Ohio, and did on or about the 23rd day of May, 1889, duly convey to said corporation a line of railway purchased by them under the proceedings last above named and described, as fol ows: Being a line of railway extending from Toledo, Ohio, to the west line of Paulding County, in said state and said corporation now owns and controls the same.

And whereas, the railroads of the several parties hereto connect with each other, as follows, to wit: The railroads of the said Toledo Western Railroad Company and said Wabash Eastern Railway Company of Indiana, parties of the first and third parties respectively, at the state line of Ohio and Indiana on the west line of Paulding County, Ohio, and the east line of Allen County, Indiana, the railroads of the Detroit and State Line Wabash Railroad Company and of the Wabash Eastern Railway Company of Indiana, parties of the second and third parts respectively, at Butler, in the County of De Kalb State of Indiana, the railroads of the Wabash Eastern Railway Company of Indiana and the Wabash Eastern Railway Company of Illinois, parties of the third and fourth parts, respectively, at the state line of Indiana and Illinois; the railroad of the Wabash Eastern Railway Company of Illinois and the Wabash Western Railway Company, parties of the fourth and fifth parts, respectively, at the City of East St. Louis, State of Illinois, and all

of said lines will form a continuous and connected line of railway from Toledo and Detroit on the east to Chicago, St. Louis and Kansas City on the west, and said lines are not competing nor parallel, and it is considered to be for the advantage of all the parties hereto and for the benefit of the public that the lines of railway above described the franchises and capital stock of all the corporations, parties hereto, should be united and consolidated and owned and worked in common.

And whereas, the capital stock of the party of the first part amounts to Seven Hundred Thousand Dollars, divided into seven thousand shares of One Hundred Dollars each.

And whereas, the capital stock of the party of the second part amounts to Three Hundred Thousand Dollars, divided into three thousand shares of One Hundred Dollars each.

And whereas, the capital stock of the party of the third part amounts to Nine Million of Dollars, divided into ninety thousand shares at One Hundred Dollars each.

And whereas, the capital stock of the party of the fourth part amounts to Twelve Million Dollars, divided into one hundred and twenty thousand shares of One Hundred Dollars each.

And whereas, the capital stock of the party of the fifth part amounts to Thirty Million Dollars, divided into three hundred thousand shares of One Hundred Dollars each.

And whereas, under the agreement of July 15, 1885, constituting said purchasing committee, it was

provided that preferred stock in the new company should be issued to the amount of $23,100,000 and common stock to the amount of $27,300,000, such amounts representing approximately the respective amounts of preferred and common stock of the said Wabash, St. Louis and Pacific Railway Company.

And whereas, the holders of said preferred and common stock have deposited their stock with the said purchasing committee under the said plan of reorganization and have received certificates evidencing such deposit and the nature and amount of the stock so deposited.

And whereas, it is intended that the stock of said new consolidated corporation shall be issued to the holders of such certificates to an amount equal to the stock as deposited by them, and being the persons entit'ed to the same and as being the equitable owners of the stock subscribed for in each of the corporations, parties hereto, in carrying out the said plan of reorganization.

Now, therefore, in consideration of the premises and of the several covenants hereinafter mentioned by the parties hereto on their part respectively to be performed, and upon and with the unanimous consent and approval expressed in writing of the stockholders of the corporations, parties hereto, it is hereby mutually stipulated and agreed:

First. The terms and conditions of this agreement shall be that from and after the consummation of this agreement and act of merger or consolidation by the corporations parties hereto and filing the same duly certified in the office of the Secretary

of State of each of the states hereinbefore mentioned, and a certified copy thereof in the office of the recorder of each of the counties through which said lines pass in the State of Illinois, the said corporations, parties hereto, shall be deemed and taken to be one corporation under the name and style of The Wabash Railroad Company.

And the powers, privileges, immunities and franchises in any manner possessed by or vested in either of said original corporations under their several charters of incorporation or under the laws of the several states or as incidental to the railway property of either of said companies, shall be transfered to and vested in said Consolidated Company. And also all and singular the real estate, depot grounds, rights of way, roadbed, railroad, iron rails, engines, cars, machinery, machine shops, buildings, structures, rolling stock, debts, dues, demands, choses in action and property of every description, name and nature, which the said consolidating roads, and any or either of them, may possess, any rights and all property, real, personal and mixed, and all choses in action or in possession and all privileges and appurtenances, reversions and remainders in any or either of said consolidating companies, shall from the day when this agreement shall be ratified by all the parties hereto and copies filed with the Secretary of State of the several states through which said roads pass, and in which the respective parties hereto were incorporated, be and become vested in the said Consolidated Company without any further or other deed, transfer or conveyance in that behalf.

The capital stock of said Consolidated Company shall be Fifty-two Millions of Dollars, of which Twenty-four Millions shall be preferred, consisting of two hundred and forty thousand shares of One Hundred Dollars each and Twenty-eight Millions of common stock, consisting of two hundred and eighty thousand shares of One Hundred Dollars each.

The said stock shall be issued to the holders of certificates evidencing the deposit of stock with the said purchasing committee under the said agreements of reorganization, as follows:

Each person holding a certificate of the deposit of preferred stock of the Wabash, St. Louis and Pacific Railway Company with the purchasing committee under the said plan of Reorganization or with the Mercantile Trust Company as the designated depository of the said purchasing committee upon the surrender of such certificates to the Consolidated Company, shall receive a corresponding number of shares of the preferred stock of the Consolidated Company each of the par value of One Hundred Dollars. Each person holding a certificate of the deposit of common stock of the Wabash, St. Louis and Pacific Railway Company with the purchasing committee under the said plan of reorganization or with the Mercantile Trust Company as the designated depository of the said purchasing committee upon the surrender of such certificate to the Consolidated Company shall receive a corresponding number of shares of the common stock of said Consolidated Corporation each of the par value of One Hundred Dollars.

Second. The mode of carrying this consolidation into effect shall be that upon the ratification of this Agreement by the Board of Directors of either of the Corporations parties hereto the said Board shall further appoint a time and place for the submission of this Agreement to the stockholders which shall not be less than sixty days from the date of its approval by the Board and notice of the time and place of such meeting shall be given in each State in the manner provided in the statutes of such State. At such meetings of the share holders of the Corporations parties hereto upon the ratification of this Agreement by the share holders of either of the Corporations parties hereto the share holders thereby shall further appoint a time and place for the election of Directors and other officers of the new Corporation provided for by this Agreement, which time and place shall be the same as fixed by all the parties hereto and not more than six months from the date of such ratification of this Agreement. All the share holders in either of said Corporations, parties hereto, shall be admitted to one vote at said election of the Board of Directors as share holders in the Consolidated Corporation in person or by proxy, each share entitling the holder thereof to one vote. The Directors then chosen shall be the Directors of the Consolidated Corporation and immediately upon their organization shall assume, enjoy and possess all powers, rights and privileges now held or enjoyed by the Board of Directors of either of said Corporations, parties hereto, and thereupon forthwith all property rights and franchises of whatever name or nature belonging to the parties of the first, second, third, fourth and

fifth parts or either of them, shall pass to and be vested in the said new Corporation AND THE FIVE NAMED CORPORATIONS SHALL FOREVER CEASE AND DETERMINE. Notice of the time and place of holding such election shall be given by the Secretary of each of the said Corporations, parties hereto, in such manner as directed by the share holders of such Corporation, and for at least three weeks, unless otherwise directed by all the stockholders of such Corporation.

Third. The number of Directors of such new Corporation shall be thirteen, all of whom shall be residents of the United States, and such members may be increased to any odd number not exceeding fifteen by the Board with the consent of the majority of the stockholders. They shall choose from their own number, a President and First and Second Vice Presidents and shall appoint such other officers as may from time to time be required. They shall have power to establish and amend By Laws, one of which shall fix the time and place of the annual meetings of the stockholders and debenture bondholders of the Consolidated Corporation. The Board first elected shall hold office until the next annual meeting of the Company and all officers of the Corporation shall serve during the pleasure of the Board.

In order to carry out the provisions of Article 13 of the Reorganization Agreement of July 15, 1885, one-half of the highest even number of the Board shall be nominated by the debenture bondholders and the other half by the stockholders and the parties so nominated shall agree upon the odd number to be elected to the Board, who shall be President

of the Company and they failing to agree, he shall be nominated by the Trustee of the debenture bond mortgage, and the Directors so nominated shall constitute and be elected the Board of the new Company. The manner in which the said nominations shall be named shall be fixed by the By Laws of the Company and also the manner in which the voting powers given to said debenture bondholders shall be exercised.

The first Board of Directors of the Consolidated Company and to act until the first election of Directors in the new Corporation herein provided for shall consist of the following persons, viz.:

NAMES.	RESIDENCES.
James F. Joy	Detroit, Michigan.
Orrian D. Ashley	New York City, New York.
Thomas H. Hubbard	New York City, New York.
Edgar T. Welles	Hartford, Connecticut.
George W. Smith.	Chicago, Illinois.
Abram M. Pence	Chicago, Illinois.
Charles Henrotin	Chicago, Illinois.
John W. Bunn	Springfield, Illinois.
John Maynard Harlan	Chicago, Illinois.

The Board of Directors first elected in said new Corporation shall have full power to issue bonds of said Corporation, secured by mortgage upon the property of the new Corporation as provided in the plan of reorganization as set forth in the contracts of July 15, 1885, and November 21, 1887, viz.

First. First Mortgage Bonds to the amount of Thirty-four Millions of Dollars, secured by mortgage upon all the Consolidated Railway Company's lines east and west of the Mississippi River, as provided and set forth in Article four of the Agreement of November 21, 1887.

Second. Second Mortgage Bonds secured upon said consolidated Company's lines of railway and property to the amount of Fourteen Millions of Dollars as provided in Article five of Agreement of November 21, 1887.

Third. Debenture Bonds to the amount of Thirty Millions of Dollars, bearing interest at six per cent. per annum, payable semi-annually and perpetual, but dependent upon the income for the interest which shall not be cumulative and with voting powers at the rate of one vote for each One Hundred Dollars and with provisions in said Bonds and in the mortgages securing the same as provided in said Agreement of reorganization, bearing date July 15, 1885, $3,500,000 of said bonds are preferred as provided in said Agreement.

Fourth. It is hereby mutually stipulated by the parties hereto that the holders of preferred stock in the new Corporation shall be entitled to a dividend of seven per cent. per annum on their par value from the earnings of said Consolidated Corporation before any dividend shall be paid upon the shares of common stock in said new Corporation, but after the holders of preferred stock shall have have received a dividend of seven per cent. upon the par value of their shares from the earnings of said new Corporation for any year they shall receive no more than the earnings of the Company for that year until a dividend of seven per cent. upon the par value of the common or remaining shares of said capital stock has been paid to the owners and holders thereof, and after that time all dividends shall be distributed alike among the holders of the preferred and common stock of said new Company.

Fifth. Five originals of these articles of Consolidation shall be signed by the President and attested by the Secretary, and sealed with the Corporate Seal of each of the consolidating parties hereto and this Agreement shall be spread upon the records of each Company and agreed to by the stockholders of each of the said Companies, and one of the said Agreements of Consolidation or a certified copy thereof filed with each of the Secretaries of State for the States of Ohio, Michigan, Indiana, Illinois and Missouri.

The stockholders of all of said Companies may by mutual agreement at the meetings called to ratify and confirm this agreement, alter or amend any of the provisions hereof, provided the said changes do not conflict with the plan of reorganization as outlined in the contracts of July 15, 1885, and November 21, 1887.

In witness whereof this Agreement and Articles of Consolidation have been signed by the Presidents and attested by the Secretaries of the said The Toledo Western Railroad Company, The Detroit and State Line Wabash Railroad Company, The Wabash Eastern Railway Company of Indiana, The Wabash Eastern Railway Company of Illinois and The Wabash Western Railway Company, the respective parties hereto, and sealed with the Corporate Seals of each of the said Companies, at a meeting of the Board of Directors of each of said Companies, and in pursuance of resolutions passed by said Directors and entered upon the records of each of said Companies as follows:

The Toledo Western Railroad Company on the 27th day of May, 1889.

The Detroit and State Line Wabash Railroad Company on the 23rd day of May, 1889.

The Wabash Eastern Railway Company of Indiana on the 21st day of May, 1889.

The Wabash Eastern Railway Company of Illinois on the 21st day of May, 1889.

The Wabash Western Railway Company on the 23rd day of May, 1889.

THE WABASH WESTERN RAILWAY CO. [SEAL.]
By O. D. ASHLEY, *President.*

ATTEST: J. C. OTTISON, *Secretary.*

THE DETROIT AND STATE LINE
WABASH RAILROAD CO. [SEAL.]
By O. D. ASHLEY, *President.*

ATTEST: J. C. OTTISON, *Secretary.*

THE TOLEDO WESTERN RAILROAD COMPANY [SEAL.]
By FRANK B. SWAYNE, *President.*

ATTEST: HARRY E. KING, *Secretary.*

THE WABASH EASTERN RAILWAY
COMPANY OF INDIANA [SEAL.]
By GEORGE W. SMITH, *President.*

ATTEST: JNO. MAYNARD HARLAN, *Secretary.*

THE WABASH EASTERN RAILWAY
COMPANY OF ILLINOIS [SEAL.]
By GEORGE W. SMITH, *President.*

ATTEST: JNO. MAYNARD HARLAN, *Secretary.*

ASSENT OF STOCKHOLDERS TO ARTICLES OF CONSOLIDATION.

Know all men by these presents, that we whose names are hereto signed, stockholders in the Wabash Eastern Railway Company of Illinois, a corporation duly organized under the laws of the State of Illinois, for the purpose of constructing, operating, owning and maintaining lines of railway in said State, being satisfied that it is for the interest of said Railway Company and the advantage of the public at large that the aforesaid Company should consolidate its property, capital, stock, franchises and rights together with the Detroit and State Line Wabash Railroad Company of Michigan, and the Toledo Western Railroad Company of Ohio, and the Wabash Eastern Railway Company of Indiana, *Company of Indiana* and the Wabash Western Railway Company of Missouri.

Said Railway Companies having their Railroads in such connection as to form a connected system of railways and continuous lines from Detroit and Toledo on the East to Chicago, St. Louis and Kansas City on the West, and the laws of the several States of Michigan, Ohio, Indiana and Illinois and Missouri having made provisions for such consolidation and having examined a certain proposed Agreement in writing entered into by the Directors of the said Corporations of the States of Michigan, Ohio, Indiana, Illinois and Missouri hereinbefore named, which Agreement was adopted by the Board of Directors of each of said Companies respectively, and entered upon their record do hereby assent to adopt

and ratify said Articles of Consolidation as our Agreement and act and the Agreement of each and every one of us.

NAME.	NO. OF SHARES.
James F. Joy, O. D. Ashley, Thomas H. Hubbard, Edgar T. Welles, Purchasing Committee, by O. D. Ashley, Secretary.	One Hundred Nineteen Thousand Nine Hundred and Ninety-five (119995) shares.
Geo. W. Smith,	one share.
Jno. Maynard Harlan,	one share.
Abram M. Pence by Geo. W. Smith, his attorney in fact,	one share.
Charles Henrotin by Geo. W. Smith, his attorney in fact,	one share.
John W. Bunn by Geo. W. Smith, his attorney in fact,	one share.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

The undersigned, George W. Smith, states upon oath that he is President of the Wabash Eastern Railway Company of Illinois, whose principal office is at Chicago; that at a meeting of the stockholders of said Corporation duly called upon sixty days notice and held at Chicago on the 27th day of July, 1889, to consider and act upon the Articles of Consolidation of the stock, property, assets, franchises, and rights of said Corporation with the stock, property, assets, franchises and rights of the Detroit and State Line Wabash Railroad Company of Michigan, of the Toledo Western Railroad Company of Ohio, of the Wabash Eastern Railway Com-

pany of Indiana *of Indiana*, of the Wabash Western Railway Company of Missouri, the entire body of share holders assembled in person or proxy and each and every share holder in said Corporation did vote for and approve the said Agreement for Consolidation, which is hereinbefore attached and set forth.

GEORGE W. SMITH.

Subscribed and sworn to before me the 27th day of July, 1889.

EDGAR R. ROMBAUER,
Notary Public.

[SEAL.]

UNITED STATES OF AMERICA, STATE OF ILLINOIS. } ss. Office of Secretary.

I, Isaac N. Pearson, Secretary of State of the State of Illinois, do hereby certify that the foregoing is a true copy of Articles of Consolidation of The Wabash Railroad Company, the original of which was filed for record in this office July 29, 1889, and duly recorded in book 9 at page 248 of Railroad Records.

IN WITNESS WHEREOF I hereto set my hand and affix the Great Seal of State at the City of Springfield this 29th day of July, A. D. 1889.

I. N. PEARSON,
Secretary of State.

Aug. 26th, 1818.
State of Illinois.
Seal of the

WILEY S. SCRIBNER,
Recorder.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1907.

No. 57.

ELBEE PATCH, administrator *de bonis non* of the estate of CHARLES W. MAXON, deceased, *Plaintiff in Error,* *vs.* WABASH RAILROAD COMPANY, *Defendant in Error*	Error to the Circuit Court of the United States for the Southern District of Illinois.

Brief and Argument for Plaintiff in Error against Motion to Dismiss.

STATEMENT.

MAY IT PLEASE THE COURT:

Action in this cause was commenced in the State Court at Springfield, Ill.; and the defendant (defendant in error here) procured the cause to be removed thence to the Circuit Court of the United States for the Southern District of Illinois. (Pr. Rec., 15.)

After removal, the plaintiff filed a plea in the nature of a plea in abatement to the jurisdiction of the court. (Pr. Rec., 20.) The defendant demurred

to that plea. (Pr. Rec., 22.) Argument was heard. The court sustained the demurrer. The plaintiff excepted to that action of the court, and elected to stand by his plea. Thereupon (and on May 19, 1906) the following order was entered:

> "This day come again the parties by their attorneys, and the Court being now fully advised, sustains the demurrer of the defendant to the plaintiff's plea in abatement to the jurisdiction of this Court. To which ruling of the Court the plaintiff excepts and elects to stand by his plea.
>
> It is therefore ordered and adjudged by the Court that the defendant recover of the plaintiff its costs and charges by it about its defense in this behalf expended to be paid by plaintiff in due course of administration. To which entry of judgment plaintiff excepts." (Pr. Rec., 23.)

Thereafter the plaintiff (plaintiff in error here) filed his assignment of errors, and presented a petition praying for a certificate of the question of jurisdiction in issue, and, for a writ of error out of this court; and, with that petition, presented also his bond, with surety. The bond was approved, and the certificate and writ of error were granted issued and filed, on Friday, the 1st day of June, 1906. (Pr. Rec. 23 to 27.) The citation was served June 4, 1906. (Pr. Rec., 29.)

On June 9, 1906, the defendant filed a printed motion to amend the certificate of the question of jurisdiction; and four days later (June 13th) the court, against the objection of counsel for the plaintiff in error, assumed to grant the motion and enter an order amending the certificate.

The defendant in error now moves in this court

to dismiss the writ of error *for want of jurisdiction*, because (1) "the certificate" does not certify alone a question of jurisdiction, and, (2) "*the certificate*" shows that the only question decided was whether the plaintiff could be permitted to perform the duties of administrator.

The argument against the motion will be made under the following propositions:

(1) The jurisdiction of the court was in issue.

(2) The assignment of errors goes to the queston of jurisdiction alone.

(3) The question of jurisdiction was properly certified by the court on June 1, 1906, although no certificate of the question was necessary.

(4) No certificate, whatever its contents, forced into the record by the defendant in error, at any time, could deprive plaintiff in error of his right to have the action of the court below on the question of jurisdiction reviewed by this court.

(5) The order of June 13, 1906, amending the certificate of the question in issue, was made without authority of law.

BRIEF AND ARGUMENT.

I.

THE JURISDICTION OF THE COURT WAS IN ISSUE.

The defendant procured the cause to be removed from the Circuit Court of Sangamon County, Ill., to the Circuit Court of the United States for the Southern District of Illinois, upon allegations of diverse citizenship. (Pr. Rec., 15.) After removal, the plaintiff filed a plea in the nature of a plea in abatement to the jurisdiction. (Pr. Rec., 20.) The defendant demurred to that plea. (Pr. Rec., 22.) Argument was heard. The court sustained the demurrer. (Pr. Rec., 23.) The plaintiff elected to stand by his plea, and the court rendered judgment for the defendant. (Pr. Rec., 23.)

This court, speaking by Mr. Justice BALDWIN, said:

> "The case is now before us for consideration, on a motion by the defendant, to dismiss the bill for want of jurisdiction in the cause.
>
> However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, *it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction.*"
>
> *Rhode Island* v. *Massachusetts*, 12 Pet., 657, 718.

II.

THE ASSIGNMENT OF ERRORS GOES TO THE QUESTION OF JURISDICTION ALONE.

The assignment of errors reads as follows:

First. The court erred in sustaining the defendant's demurrer to the plaintiff's plea in abatement to the jurisdiction of the court.

Second. The court erred in holding that it had jurisdiction or power to entertain the suit.

Third. The court erred in entering judgment in favor of the defendant and against the plaintiff.

III.

THE QUESTION OF JURISDICTION WAS PROPERLY CERTIFIED BY THE COURT ON JUNE 1, 1906, ALTHOUGH NO CERTIFICATE OF THE QUESTION WAS NECESSARY.

That certificate and the file mark thereon read as follows:

> "In this cause, I hereby certify that the judgment herein rendered is based solely on the ground that the record, in my opinion shows that the controversy involved is one between citizens of different states, and that the defendant is not a citizen of, or resident in, the State of Illinois where the suit was brought; that no other ground of jurisdiction appears, and jurisdiction was retained only for the reasons above stated.
>
> "This certificate is made conformably to the act of Congress of March 3, 1891, Chapter 517.
>
> Dated this 1st day of June, A. D. 1906."
>
> "Filed June 1, 1906." (Pr. Rec., 26.)

That was the question on the record.

This court has said:

> "Where the record shows that the only matter tried and decided in the Circuit Court was a demurrer to a plea to the jurisdiction, and the petition upon which the writ of error was allowed asked only for the review of the judgment that the court had no jurisdiction of the action, the question of jurisdiction alone is sufficiently certified to this court as required by the Act of March 3, 1891, Chap. 517, Sec. 5."
>
> *Interior Construction Co.* v. *Gibney*, 160 U. S., 217.

IV.

NO CERTIFICATE, WHATEVER ITS CONTENTS, FORCED INTO THE RECORD BY THE DEFENDANT IN ERROR, AT ANY TIME, COULD DEPRIVE THE PLAINTIFF IN ERROR OF HIS RIGHT TO HAVE THE ACTION OF THE COURT BELOW ON THE QUESTION OF JURISDICTION REVIEWED BY THIS COURT.

Upon this proposition. the following authorities are submitted, viz.:

> "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."
>
> *Ansbro* v. *United States*, 159 U. S., 695, 698.

> "A certificate of the presiding judge of the state court, made after decision to the effect that a Federal question was considered and decided, cannot confer jurisdiction on this court, where the record does not otherwise show it exists."
>
> *Marvin* v. *Trout*, 199 U. S., 212.

"Circuit Courts of Appeal have no power to issue a mandamus directing a Circuit Court to dismiss a case in *limine* on the ground that no jurisdiction has been acquired over the defendant by the method of service pursued, for the Circuit Courts of Appeal can only issue a mandamus in aid of their own jurisdiction (Act of March 3, 1891, Sec. 12, Rev. St., Sec. 716); *and they have no jurisdiction in a case in which the only question involved is the jurisdiction of the Court below, as such cases are reviewable on appeal only in the Supreme Court.*" (Syllabus.)

United States ex rel. County of Irons v. *Severens, Dist. J.*, 71 Fed., 768 (C. C. A.), Taft, Lurton and Hammond, JJ.

"When upon writ of error, the only question presented by the record goes to the jurisdiction of the court below, a review of the determination of that question can only be had in the Supreme Court."

Cabot v. *McMaster*, 65 Fed., 533 (C. C. A.), Woods, Jenkins and Baker, JJ.

"Under the Act of March 3, 1891, creating the Circuit Court of Appeals, and declaring that appeals and writs of error may be taken from the trial court directly to the Supreme Court 'in a case in which the jurisdiction of the court is in issue,' *the Circuit Court of Appeals has no jurisdiction to review a judgment dismissing an action on demurrer for want of jurisdiction.*"

Davis & Rankin Bldg. & Mfg. Co. v. *Barber*, 60 Fed., 465 (C. C. A.), Jenkins, Bunne and Seaman, JJ.

A standard author upon the subject of Federal Procedure states the law thus:

"When a final judgment or decision has been rendered in a District or Circuit Court involv-

ing both questions of jurisdiction and other questions, the party against whom it is rendered may elect to take his writ of error to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals on the whole case. When he chooses the latter, the Circuit Court of Appeals has jurisdiction to determine the question of the jurisdiction of the court below, as well as all other questions in the case (*Rust* v. *United Water Works Co.,* 36 U. S. App. 167; 70 Fed., 129; *B. & O. Ry. Co.* v. *Meyers,* 62 Fed., 367, and other cases), and if an appeal is taken to the Circuit Court of Appeals, and the whole case has been determined on its merits, an appeal cannot then be taken to the Supreme Court directly from the Circuit Court on the question of jurisdiction; such a case can be taken to the Supreme Court only upon *certiorari* after finding and decree upon the merits in the Circuit Court of Appeals."

Desty's Federal Procedure, Vol. 1, Sec. 175, Note 1.

V.

THE ORDER OF JUNE 13, 1906, AMENDING THE CERTIFICATE OF THE QUESTION IN ISSUE, WAS MADE WITHOUT AUTHORITY OF LAW.

There are several reasons assignable in support of this proposition. *First,* the writ of error had before that time been granted issued and filed. *Second,* the term of court at which the judgment was rendered and the writ of error issued and filed, had passed. *Third,* the court could not contradict the record by a certificate. *Fourth,* after removal and before further action had been taken, the plaintiff interposed a plea in the nature of a plea in abatement to the jurisdiction, and the defendant de-

murred to that plea; and the plaintiff at all times thereafter stood upon the question of jurisdiction alone.

The assignment of errors, and petition for a certificate of the question in issue and for a writ of error, were filed on the 31st day of May, 1906 (Pr. Rec., 24, 25); and on June 1, 1906, the certificate and writ of error were issued and filed. (Pr. Rec., 26 and 1.) On the 9th day of June, 1906, the defendant filed a motion for an order rescinding and annulling the certificate (Pr. Rec., 27); and on the 13th day of that month the order was made against the objection of the plaintiff in error.

Now this court will judicially notice that the 1st day of June, 1906, fell upon Friday. The statute fixing the terms of court reads as follows:

> "The regular terms of the Circuit Courts shall be held in each year, at the times and places following; but when any of said dates shall fall on Sunday, the term shall commence on the following day."
>
> * * * * * *
>
> "In the Southern District of Illinois at Springfield on the first Mondays in January and June."
>
> Rev. Stat. of U. S., Ch. 8 Sec. 658.

Yet counsel for defendant in error, in their brief on the motion to dismiss, say that the motion to amend the certificate was made *at the same term* at which the certificate was issued. Notably, on page 7, they say:

> "and on the 1st day of June, 1906, *a day in the June Term of said Court,*" etc.

But it was in the January term.

And on page 8 they say:

> "Afterwards, on the 9th day of June, 1906, a day in *said* June Term, the defendant in error filed in the court below its motion, on due notice, for an order rescinding and annulling the certificate aforesaid, and for such other order by way of amendment or otherwise, as the Court shall deem meet, so that the records of the proceedings in the case shall truly set forth the fact with respect to the questions actually determined by the Court."

And on page 9 counsel say:

> "Thereafter, on the 13th day of June, 1906, a day in the said June Term," etc.

And on page 14 counsel say:

> "It appears by the record of this case that the supplemental or amendatory certificate of the Circuit Court was issued during *the same term as was the original certificate.*"

Counsel entirely ignore the fact that the writ of error had been issued and filed. They stand upon the proposition that the 1st day of June, 1906, was a day in the June term of the Circuit Court of the United States for the Southern District of Illinois. But their contention is directly in the face of the statute.

This court has stated the law as follows:

> "In *Bronson* v. *Schulten,* 104 U. S., 410, 415, the court, after adverting to the general rule that the judgments, decrees or other orders of a court, however conclusive in their character, are under its control during the term at which they are rendered, and may be set aside, vacated modified or annulled by it, said: 'It is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be

taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been applied by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court.' The same principles had been announced in *Sibbald* v. *United States,* 12 Pet., 488, 492. The exceptions to the general rule, such as suits in equity, and writs of error *coram vobis* at law, do not embrace the present application. See also *Phillips* v. *Negley,* 117 U. S.. 665, 674, 675; *Cameron* v. *McRoberts,* 3 Wheat., 591; *McMicken* v. *Perin,* 18 How., 507, 511."

Hickman v. *Fort Scott,* 141 U. S., 415, at 418.

"It was said by this court in *Generes* v. *Bonnemer,* 7 Wall., 565, that '*to permit the judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy.*' This language is substantially adopted in *Flanders* v. *Tweed,* 9 Wall. 425, where it was said 'the statement of facts by the judge is filed upon the 29th of May, 1868, nearly three months after the rendition of the judgment. *This is an irregularity for which this court is bound to disregard it, and to treat it as no part of the record.*

As early as *Walton* v. *United States,* 9 Wheat., 651, the power to reduce exceptions

> taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from the rule. *A judge cannot act judicially upon the rights of parties, after the parties in due course of proceeding have both in law and in fact been dismissed from the court.*"
>
> *Muller et al.* v. *Ehlers*, 91 U. S., 249, 250.

After the writ of error had been filed, the case was pending in this court. The command in the writ was to send up the record of the proceedings; not to make a record and send that up.

It would, indeed, be strange law under which the defendant in error could, after the writ had been sued out and filed, either add to or take from the record, by any action whatever. And this court well said, in the case last cited, that to permit such things would be to place the rights of parties entirely in the power of the judge, without hearing and without remedy.

Neither detailed argument, nor further citation of authorities, is believed to be necessary.

It is apparent that the motion is without merit, and should be denied.

Respectfully submitted.

GEORGE C. OTTO,
Counsel for Plaintiff in Error.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1906.

ELBEE PATCH, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF CHARLES W. MAXON, DECEASED,
Plaintiff in Error,

vs.

THE WABASH RAILROAD COMPANY,
Defendant in Error.

No. 328

MOTION TO DISMISS.

Comes now the defendant in error, The Wabash Railroad Company, and moves the Court to dismiss the writ of error in this case for want of jurisdiction, because (1) the certificate of the Circuit Court granted and issued in this case does not certify alone a question of jurisdiction; and (2) the said certificate shows that the sole question decided by the Circuit Court on the demurrer to plaintiff's plea in abatement was that said plea was defective in that from the averment therein that plaintiff was a citizen of the State of Ohio, it followed as a necessary inference that his legal residence was also in the State of Ohio, and hence dis-

qualified from maintaining this action or filing any plea therein as administrator, because the statute of Illinois then and now in force prohibits a non-resident of said State from acting as an administrator therein.

WELLS H. BLODGETT,
F. D. McKENNEY,
Counsel for Defendant in Error for the Purposes of this Motion.

To George C. Otto:

Please take notice, that on the 21st day of October, 1907, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of my statement, brief and argument in support of said motion.

WELLS H. BLODGETT,
F. D. McKENNEY,
Counsel for Defendant in Error for the Purposes of this Motion.

STATEMENT AND BRIEF ON MOTION.

STATEMENT.

This is an action for damages for the death of Charles W. Maxon, while in the employ of defendant in error, as a locomotive engineer, on or about September 6th, 1904, near Marley, in the State of Illinois.

Plaintiff in error instituted this action August 14th, 1905, in the Circuit Court of Sangamon County, State of Illinois, as the administrator *de bonis non* of the estate of Charles W. Maxon, alleging damage to "said plaintiff, as administrator *de bonis non*" in the sum of Ten Thousand Dollars, etc.

The declaration also states that "plaintiff brings into Court here the letters of administration *de bonis non* to him granted by the Probate Court of Cook County, Illinois, which give sufficient evidence to the Court here of the grant of administration *de bonis non* of said estate to said plaintiff (Record p. 15).

On the 6th day of September, 1905, defendant in error filed its petition and bond for the removal of said cause to the United States Circuit Court for the Southern District of Illinois, and therein averred that it was at the time of the commencement of said suit, and still is, a corporation created and organized by and under the laws of the State of Ohio, and was at the time of the commencement of said suit, and still is, a citizen of said State of Ohio, and was at the time and commencement of said suit, and still is, a non-resident of the State of Illinois, and that said plaintiff was at the time of the commencement of said suit, and still is, a citizen and resident of the State of Illinois.

Thereafter, on the 18th day of September, 1905, said Circuit Court of Sangamon County, granted the prayer of said petition and ordered said cause removed to the United States Circuit Court as prayed (Record p. 18).

Thereafter, the following proceedings in said cause were had in the said Circuit Court of the United States:

On the 30th day of December, 1905, plaintiff in error filed his plea in abatement to the petition for removal of defendant in error, which said plea (omitting caption) is in words and figures as follows, to-wit:

> "And the said plaintiff, Elbee Patch, administrator *de bonis non* of the estate of Charles W. Maxon, deceased, in his own proper person comes and defends against said defendant's petition for removal of this action from the Circuit Court of Sangamon County, Illinois, to this Court; and says, that before and at the time of the commencement of this action said defendant was a railroad corporation, created under and by virtue of the laws of the States of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other railroad corporations; and, that one of said other corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, one was a corporation created, organized and existing under and by virtue of the laws of the State of Missouri; one was a corporation created, organized and existing under and by virtue of the laws of the State of Indiana; one was a corporation created, organized and existing under and by virtue of the laws of the State of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the State of Ohio; that said consolidation was effected and said defendant corporation was organized, and before and at the time of the commencement of this action, existed, under and by virtue of the laws of the State of Illinois and the laws of each of said four other States; and, that before and at the time of the commencement of this action, said defendant was, and still is, a citizen of, and resident in, the State of Illinois, and each of said four other States; and, *that before and at the time of the commencement of this action, this plaintiff was, and still is, a citizen of the State of Ohio;* and this he

is ready to verify; wherefore he prays judgment whether this Court will or can take cognizance of this action.

ELBEE PATCH,
Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, Plaintiff.

(Record p. 20.)

GEORGE C. OTTO,
Attorney for Plaintiff.

State of Ohio,
ss.
County of Fayette.

Elbee Patch, being first duly sworn, deposes and says, that the foregoing plea by him subscribed as Administrator *de bonis non* of the Estate of Charles W. Maxon, deceased, is true, in substance and in fact; and further deponent saith not.

ELBEE PATCH.

Subscribed and sworn to before me, a notary public, in and for the county and State aforesaid, this 27th day of December, A. D. 1905.

(Seal) H. W. JONES,
Notary Public.

My commission expires Oct. 20th, 1907.

On the 8th day of January, 1906, defendant in error filed in said Court, its plea in said case. (Record, p. 21).

Defendant in error was ruled to reply to plaintiff's plea in abatement, and did thereafter, on to-wit, the 6th day of February, 1906, file in said court its general and special demurrer to said plea of plaintiff in abatement of defendant's petition for the removal of said cause, which said demurrers (omitting caption) are in words and figures as follows, to-wit:

"And the defendant by McAnulty and Allen, its attorneys, says that the plea of the plaintiff to the defendant's petition for the removal of this cause to the

Circuit Court of the United States for the Southern District of Illinois and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to be replied unto and that it, the defendant, is not bound by law to answer the same; and this it is ready to verify; wherefore for want of a sufficient plea in this behalf the defendant prays judgment, etc.

McANULTY & ALLEN,
Attorneys for Defendant.

And for special cause of demurrer the defendant shows unto the Court here the following causes, to-wit, for that said plea is not responsive to the averments contained in the defendant's petition for removal and neither traverses nor confesses and avoids the same, and for that said plea contains allegations wholly foreign to the issue tendered by said petition for removal and not responsive thereto, said allegations being as follows:

'That before and at the time of the commencement of this action said defendant was a railroad corporation, created under and by virtue of the laws of the States of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other railroad corporations; and, that one of said corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the State of Illinois, one was a corporation created, organized and existing under and by virtue of the laws of the State of Missouri, one was a corporation created, organized and existing under and by vitrue of the laws of the State of Indiana, one was a corporation created, organized and existing under and by virtue of the laws of the State of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the State of Ohio; that said consolidation was effected and said defendant corporation was organized, and before and at the time of the commencement of this atcion, existed, under and by virtue of the laws of the State of Illinois and the laws of each of said four other States; and, that before and at the time of the commencement of

this action, said defendant was, and still is, a citizen of, and resident in, the State of Illinois, and each of said four other States.' And for that said plea is in other respects both in form and substance, uncertain, informal and insufficient, etc.

McANULTY & ALLEN,
(Record p. 22) *Attorneys for Defendant.*"

On the 19th day of May, 1906, the Court below sustained the demurrer of defendant in error to plaintiff's said plea in abatement, to which ruling of the Court the plaintiff did then and there except, and did elect to stand by his plea. Thereupon the Court entered judgment aginst the plaintiff and in favor of the defendant, to which entry of judgment plaintiff then and there excepted. (Record p. 23).

On the 31st day of May, 1906, plaintiff in error filed his petition for a writ of error to this court, praying, also that the court below certify to this Court, conformable to the Act of Congress of March 3rd, 1891, Chapter 517, the question of jurisdiction of the Court. (Record, p. 24).

Plaintiff in error, on the date last aforesaid, filed his assignment of error, and bond, and on the first day of June, 1906, a day in the June Term of said Court, the writ of error was duly allowed. (Record, p. 1). On the same day of said Term the Court below issued a certificate as prayed by plaintiff in error, which certificate (omitting caption) is in words and figures as follows:

"CERTIFICATE.

In this cause, I hereby certify that the judgment herein rendered is based solely on the ground that the record, in my opinion, shows that the controversy involved is one between citizens of different States, and that the defendant is not a citizen of, or resident in, the State of Illinois where the suit was brought; that no

other ground of jurisdiction appears, and jurisdiction was retained only for the reasons above stated.

This certificate is made comformable to the Act of Congress of March 3rd, 1891, Chapter 517.

Dated this 1st day of June, A. D. 1906.

HUMPHREY,

(Record, p. 26). *United States District Judge.*"

Afterwards, on the 9th day of June, 1906, a day in said June Term, the defendant in error filed in the Court below its motion, on due notice, for an order rescinding and annulling the certificate aforesaid, or for such other order by way of amendment or otherwise, as the Court shall deem meet, so that the records of the proceedings in the cause shall truly set forth the fact with respect to the questions actually determined by the Court.

And in support of said motion the defendant shows to the Court:

"1. That said certificate was inadvertently and improvidently executed and was obtained upon the last (first) day of June Term 1906 of this Court without knowledge of or notice to the defendant or its attorneys.

2. That the question of jurisdiction by reason of diversity of citizenship between plaintiff and defendant was not in fact determined in this action nor was jurisdiction thereof reserved as recited in this certificate by reason of such diversity of citizenship.

3. That the only question determined was the insufficiency of the plaintiff's plea in abatement.

4. That the defendant's demurrer to said plea of abatement was not in fact substained upon the ground of diversity of citizenship of the parties from the averments of the pleadings, but upon entirely different grounds, to-wit:

The lack of status in the plaintiff as a citizen of Ohio and non-resident of Illinois to act as administrator under the Statutes of Ilinois in bringing and maintain-

ing this action and filing said plea and upon other ground not involving the question of diversity of citizenship.

McANULTY & ALLEN,
(Record, p. 27). *Attorneys for Defendant.*"

Thereafter, on the 13th day of June, 1906, a day in the said June Term, the Court below sustained the aforesaid motion of defendant in error, and by proper order, amended the certificate of the Court theretofore issued on the first day of June, 1906, which amended certificate of said Court (omitting caption) is in words and figures as follows, to-wit:

"TRESPASS.

This cause came on to be heard on motion of the defendant for an order annulling or amending a certain certificate as to jurisdiction, dated the 31st day of May, 1906, and the Court having heard the argument of counsel for defendant in support of said motion and of counsel for plaintiff in opposition thereto, upon examination of said certificate, finds the same was inadvertently signed under a mistake as to the nature and contents thereof and that the matters determined by the Court are not correctly set forth therein.

It is therefore ordered by the Court that said certificate be amended so as to read as follows: 'In this cause I hereby certify that this action was brought in the Circuit Court of the County of Sangamon, State of Illinois, and was afterwards removed to this Court by the defendant upon its petition for removal based solely upon the ground of diverse citizenship between the parties wherein it stated among other things that it, the defendant, was a corporation organized under the laws of the State of Ohio, and a citizen of said State of Ohio and a non-resident of the State of Illinois, and that the plaintiff was a citizen of the State of Illinois; that after said cause was removed to this Court the plaintiff filed a plea in abatement to the jurisdiction of the Court, alleging amongst other things that

the plaintiff was a citizen of the State of Ohio; that the defendant demurred generally and specially to said plea, that said demurrer was argued by counsel for the parties and the demurrer sustained, the Court being of opinion that said plea *was defective in that from the averment therein that the plaintiff was a citizen of the State of Ohio it followed as a necessary inference that his legal residence was also in the State of Ohio, and* hence that he was a non-resident of the State of Illinois *and therefore deprived of any status to maintain this action or to file said plea under the Statute of the State of Illinois prohibiting a non-resident of said State from acting as administrator therein;* that upon said demurrer having been sustained the plaintiff elected to stand by his plea and judgment was thereupon rendered in favor of the defendant and against the plaintiff for costs; that said cause was pending in this Court solely upon the ground of alleged diversity of citizenship between the plaintiff and defendant but that the question of jurisdiction was not passed upon by the Court.

To the entry of this order the plaintiff except." (Record, p. 28).

The final proviso of Section 18 of Chapter 3 of the Statutes of Illinois, entitled "Administration" (4 Starr & Curtiss Statutes, p. 32), as amended by the Act of 1897 (Laws of Illinois, 1897, p. —) provided that "no non-resident shall be appointed *or act* as executor."

In 1905 this section was amended by an Act of the Illinois Legislature, entitled "An Act to amend Section 18 of an Act entitled 'An Act in regard to the administration of Estates,' approved April 1st, 1872, in force July 1st, 1872." (Laws of Illinois, 1905, p. 2), so as to read as follows:

AN ACT ENTITLED "AN ACT TO AMEND SECTION 18 OF AN ACT ENTITLED 'AN ACT IN REGARD TO THE ADMINISTRATION OF ESTATES,' APPROVED APRIL 1, 1872, IN FORCE JULY 1, 1872.

Section 1. BE IT ENACTED BY THE PEOPLE

OF THE STATE OF ILLINOIS REPRESENTED IN THE GENERAL ASSEMBLY: That Section 18 of an Act entitled "An Act in regard to the administration of estates," approved April 1, 1872, and in force July 1, 1872, and acts amendatory thereof, be and the same is hereby amended to read as follows:

18. Administration of the estate of all persons dying intestate shall be granted to some one or more of the persons hereinafter mentioned and they are respectively entitled to preference thereto in the following order:

1. To the surviving husband or wife, or any competent person nominated by him or her.

2. To the children of any competent person nominated by them.

3. To the father or any competent person nominated by him.

4. To the mother or any competent person nominated by her.

5. To the brothers or any competent person nominated by them.

6. To the sisters or any competent person nominated by them.

7. To the grandchildren or any competent person nominated by them.

8. To the next of kin or any competent person nominated by them.

9. To the public administrator or to any creditor who shall apply for the same.

PROVIDED, that only such persons as are entitled to administer under this act shall have the right to nominate. When several are claiming and are equally entitled to administration the Court may grant letters to one or more of them, preferring relatives of the whole to those of half blood. Preference and the right to nominate under this act must be exercised within sixty days from the death of

the intestate, at the expiration of which time administration shall be granted to the public administrator.

In all cases where the intestate is a non-resident, and in all cases where there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, who at the time of the death of said decedent is a *bona fide* resident of this State, administration shall be granted to the public administrator; and in all cases where any contest shall arise between the widow, heirs at law or next of kin of the decedent in relation to the grant of letters, and it shall appear to the Court that the estate of said decedent is liable to waste, loss or embezzlement, administration to collect shall be granted to the public administrator of the proper county to administer such estate until said contest is determined. No administration shall in any case be granted until satisfactory proof shall be made to the county court to whom application for that purpose is made that the person in whose estate letters of administration are requested is dead and died intestate: PROVIDED, that when the heirs are residents of this State and the estate is solvent and without minor heirs and it is desired by the parties in interest to settle the estate without administration this law shall not apply: AND FURTHER PROVIDED, that no non-resident of this State shall be appointed or act as administrator or executor.

Approved May 12, 1905.

By this amendatory act the final proviso of said Section 18 was changed by adding the word "administrator" thereto, so that said section, in force prior to the date this action was filed, provided "that no non-resident of this State shall be appointed *or act* as administrator or executor."

The case is now here on writ of error granted conformable to the Act of March 3rd, 1891, Section 5. The question of the jurisdiction of this Court, which arises upon the record, will be discussed under the following heads:

I.

The Circuit Court had the power to issue the amended certificate for the reason that such amended certificate was issued during the same term of the Court as was the original certificate.

II.

The amended certificate of the Circuit Court does not certify a question of jurisdiction. The question certified is strictly one of error on the merits, and, therefore, not subject to review in this proceeding.

III.

The judgment of the Circuit Court, as shown by the amended certificate, rested alone on the denial of the legal capacity of plaintiff to maintain the action under the Statutes of the State of Illinois, and not on the question of its jurisdiction, as such.

ARGUMENT.

I.

It appears by the record of this case that the supplemental or amendatory certificate of the Circuit Court was issued during the same term as was the original certificate.

Also, it appears by the record that said original certificate was signed by the judge inadvertently and under a mistake as to the nature and contents thereof. In such case no objection can be urged against the action of the judge in amending his certificate, after due notice given to plaintiff.

The amending of the original certificate at the same term, because inadvertently entered, left the case as if said inadvertent certificate had not been issued.

In Aetna Life Ins. Co. v. Board of Commissioners (79 Fed. 575). it was said:

> "The judgment entered on June 3rd, 1895, having, as appears by the statement of the Judge, been inadvertently ordered to be entered, was properly, on the Judge's own motion, three days later, in the same term, set aside and held for naught. The Court had full power over its judgments and orders to vacate them or correct them during the same term. *Ex parte* Lang, 18 Wall. 163. Goddard v. Ordway, 101 U. S., 752. The vacating of the judgment at the same term, because inadvertently entered, left the case as if said inadvertent judgment had not been entered."

In Wyler v. Ry. Co. (89 Fed. 41) Judge Phillips, said:

> "It is the common learning of the law that 'during the term wherein any judicial act is done, the record remaineth in the breast of the judge of the Court, and in his remembrance, and therefore the roll is alterable during that time as the judge shall direct; but when the term is past, then the record is in the roll, and admitteth no alteration, averment or proof to the contrary.' 2 Co. Litt., 260, Sec. 438. So it is said in Ashley v. Glasgow, 7 Mo. 320, that 'when a final judg-

ment is rendered in a cause, and that judgment is erroneous, it may during the term at which it was rendered, be set aside; for during the term all the proceedings are in the breast of the judge, and they may be altered or vacated as justice requires.' "

From these decisions, it would follow that the order of the Court amending its certificate theretofore issued, would leave the case as though the original certificate had never been issued. Hence the only certificate before this Court is the amended certificate of June 13th, 1905, and the only questions certified to this Court for decision are those set forth therein.

II.

The amended certificate of the Circuit Court is insufficient for the reason that it does not certify to this Court a question of jurisdiction The question certified is strictly one of error, and, therefore, not subject to review in this proceeding.

The record of this case shows that plaintiff instituted this action as the administrator *de bonis non* of the estate of Charles W. Maxon, in the Circuit Court of Sangamon County, State of Illinois, on August 14th, 1905.

The Act of the Illinois Legislature approved May 12th, 1905, (in force July 1st, 1905), amending Section 18 of the Act, relating to the administration of estates, provided that no non-resident shall be appointed *or act* as administrator or executor. (Laws of Illinois, 1905, p. 2.)

The action was removed to the Circuit Court of the United States for the Southern District of Illinois on petition of defendant in error, wherein it was alleged by the petitioner that it was at the commencement of the suit, and still is, a corporation created and organized by and under the laws of the State of Ohio, and was at the time of the commencement of this suit and still is a citizen of the State of Ohio, and was at the time of the commencement of this

suit and still is, a non-resident of the State of Illinois, and the said plaintiff, was at the time of the commencement of said suit, and still is, a citizen and resident of the State of Illinois.

After said suit had been removed to the Federal Court as prayed in the petition for removal, the plaintiff in error filed his plea in abatement to said petition. This plea was verified by plaintiff before a notary public, in and for the County of Fayette, State of Ohio (Record, p. 20), and alleged that defendant was a consolidated corporation, consisting of corporations organized under the laws of Ohio, Indiana, Illinois, Michigan and Missouri respectively. And plaintiff further alleged in his said plea "*that before and at the time of the commencement of this action, this plaintiff was and still is, a citizen of the State of Ohio.*" (Record, p. 20.)

To this plea, defendant in error demurred generally and specially. (Record, p. 22.)

By these demurrers the sufficiency of the plea in abatement was put in issue upon two distinct and separate grounds, viz.: *First*, the question of the citizenship of the defendant company, under the allegations of the plea; and *second*, the question of the legal capacity of plaintiff to sue as administrator *de bonis non*, under the provisions of the Statutes of the State of Illinois then and now in force. This issue being distinctly made by the allegation in said plea, under oath of plaintiff, "that *before* and *at the time* of the commencement of this action, *this plaintiff was and still is a citizen of the State of Ohio.*"

Of these two questions, the second must necessarily be first determined, because, if plaintiff could not, under the Statute of Illinois, maintain the action, then manifestly his legal status was such that he could not make the plea in question. If it be first determined that plaintiff's legal status, disclosed on the face of the plea, precluded him from

making the plea in abatement, then it is clear that such determination did not in any proper sense, amount to a determination of the jurisdiction of the Court, as such.

This was the view taken by the learned judge in his opinion sustaining the demurrer to plaintiff's plea in abatement, for he says in his amended certificate:

> "In this cause I hereby certify that this action was brought in the Circuit Court of the County of Sangamon, State of Illinois, and was afterwards removed to this Court by the defendant upon its petition for removal based solely upon the ground of diverse citizenship between the parties wherein it stated among other things that it the defendant, was a corporation organized under the laws of the State of Ohio and a citizen of said State of Ohio, and a non-resident of the State of Illinois, and that the plaintiff was a citizen of the State of Illinois; that after said cause was removed to this Court the plaintiff filed a plea in abatement to the jurisdiction of the Court alleging amongst other things that the plaintiff was a citizen of the State of Ohio; that the defendant demurred generally and specially to said plea, that said demurrer was argued by counsel for the parties and the demurrer sustained, the Court being of opinion that said *plea was defective in that from the averment therein as a necessary inference that his legal residence was also in the State of Ohio, and hence that he was a non-resident of the State of Illinois, and therefore deprived of any status to maintain this action or to file said plea under the Statute of the State of Illinois, prohibiting a non-resident of said State from acting as administrator therein;* that upon said demurrer having been sustained the plaintiff elected to stand by his plea and judgment was thereupon rendered in favor of the defendant and against the plaintiff for costs; that said cause was pending in this Court solely upon the ground of alleged diversity of citizenship between the plaintiff and defendant, but that the question of jurisdiction was not passed upon by the Court."

It is apparent from the foregoing certificate that the sole question determined by the decision of the Circuit Court was, that on the face of the plea, the plaintiff was not entitled to act as administrator under the law of Illinois, and, therefore, was deprived of legal capacity to maintain the said plea in abatement

The question of jurisdiction not being passed upon by the Circuit Court, according to the express statement contained in the amended certificate, and consequently no question of jurisdiction being certified here, this Court has no jurisdiction under the first class named in Section 5 of the Act of March 3rd, 1891.

In Cincinnati, etc. R. R. Co., vs. McKeen, 149 U. S. 259, it was held that the act of March, 1891, does not contemplate the certification of questions of law to be answered in view of the entire record of the cause, although this Court may, if it sees fit, order the entire record to be sent up, and thereupon decide the case, as if it had been brought up by writ of error or appeal.

In Maynard v. Hecht, 151 U. S., 324, Mr. Chief Justice Fuller, speaking for the Court, says (325):

> "Under Section five of the Judiciary Act of March 3, 1891, a writ of error can be taken directly to this court from the Circuit Courts only in the six classes of cases therein mentioned, and the contention is that the writ may be sustained in this case as falling within the first-class, described in that section as follows: 'In any case in which the jurisdiction of the Court is in issue; in such case the question of jurisdiction alone shall be certified to the Supreme Court, from the Court below for decision' According to that provision the question involving the jurisdiction of the Circuit Court must have been in issue and decided against the party seeking to bring it before this court for determination, and must be certified for decision. And as no such question was certified by the Circuit Court in this case, we are confronted on the threshold with the in-

quiry whether we can take jurisdiction of the writ, and inquiry controlled by the rule that an affirmative description of the appellate jurisdiction of this Court in a suit implies a negative on the exercise of such appellate power as is not comprehended within it."

After a comparison of the requirements of Section Six with those of Section Five of the Act, the opinion continues (327-328):

> "We think the intention of Congress as to the certification mentioned in both Sections is to be arrived at in the light of the rules theretofore prevailing as to certifying from the Court below, and since, in the instance of an appeal upon the question of jurisdiction under the fifth section of the act, a certificate by the Circuit Court presenting such question for the determination of this Court is explicitly and in terms required in order to invoke the exercise by this Court of its appellate jurisdiction, we are of opinion that the absence of such certificate is fatal to the maintenance of the writ of error in this cause. The narrowness of range in the particular instance can make no difference in the application of the principle."

Moran v. Hagerman, 151 U. S., 329.

Also in Davis, etc. Mfg. Co. v. Barber, 157 U. S., 673, the Chief Justice says (673-674):

> "This was an action brought against certain subscribers to a contract to recover damages for its breach. Defendants demurred upon the grounds that the Court had no jurisdiction over the subject-matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action against them. The demurrers were sustained, and judgment rendered in favor of defendants on June 28th, 1892. The writ of error from this Court was sued out February 16th, 1894. It does not appear by the record, but is conceded by counsel, that a writ of error was taken to the Circuit Court of Appeals for the Seventh Circuit, and dismissed for want of jurisdiction. 60 Fed. Rep. 465.

> The jurisdiction of this Court is invoked upon the ground that the only question in the case was as to the jurisdiction of the Circuit Court, but that question was not certified to this Court by the Circuit Court for decision, and the writ of error must be dismissed upon the authority of Maynard v. Hecht, 151 U. S., 324; Colvin v. Jacksonville, ante, 368, and cases cited."

Mr. Justice Gray, speaking for the Court (Chappel v. U. S., 499), says:

> "In order to bring a case within the first class (of Section 5), not only must it appear of record that a question of jurisdiction was involved in the decision below, *but that question, and that alone,* must be certified to this Court. If both a question of jurisdiction and other questions were before the Court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, this Court cannot take jurisdiction under this clause of the Statute."

Nor does the record in this cause show that any question of jurisdiction was decided by the Court below.

The petition for writ of error says that the Circuit Court "sustained the defendant's demurrer to the plaintiff's plea in abatement to the jurisdiction of this Court, and that plaintiff elected to stand by the plea, etc. (Record, p. 24.)

The assignments of errors are:

First. The Court erred in sustaining the defendant's demurrer to plaintiff's plea in abatement to the jurisdiction of the Court.

Second. The Court erred in holding that it had jurisdiction or power to entertain the suit.

Third. The Court erred in entering judgment in favor of the defendant and against the plaintiff. (Record, p. 25.)

The writ of error was allowed generally, and without specification or limitation. (Record, p. 1.)

So that, the amended certificate of the Court furnishes the only criterion of the question decided below, and this question, as we have shown, was not one of jurisdiction at all.

If the Court below was wrong in deciding that, under the law of Illinois, plaintiff was deprived of any status to make the plea in abatement, then such decision was purely one of error and not subject to review in this proceeding.

III.

The decision of the Circuit Court, as shown by the amended certificate, rested alone on the denial of the legal capacity of plaintiff under the Statute of Illinois, to maintain this action or to file said plea, and not on the question of its jurisdiction, as such.

Where the decision of the trial court, either in dismissing the action, or in rendering judgment against a plaintiff in error, is on any ground other than that of jurisdiction alone, then the writ of error or appeal cannot be sustained under any of the classes mentioned in Section 5 of the Judiciary Act of March 3rd, 1891.

Such was the decision of this Court in Blythe vs. Hinckley, (173 U. S. 501). The facts in that case sufficiently appear in the following quotations from the opinion of the Court by Mr. Chief Justice Fuller (506-507):

> "We have heretofore determined that review by certificate is limited by the Act of March 3, 1891, to certificates by the Circuit Courts, made after final judgment, of a question in issue as to their own jurisdiction; and to certificates by the Circuit Courts of Appeal of questions of law in relation to which the advice of this Court is sought. United States v. Rider, 163 U. S., 132.
>
> Appeals or writs of error may be taken directly from the Circuit Courts to this Court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal Courts, the question alone of

jurisdiction being certified to this Court. The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States. Smith v. McKay, 161 U. S. 355; Blythe Company v. Blythe, 172 U. S. 644.

The Circuit Court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the Circuit Court was a Federal Court, but a decision that the Circuit Court was unable to grant relief because of the judgments rendered by those other courts.

If we were to take jurisdiction on this certificate, we could only determine whether the Circuit Court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect." .

Smith v. McKay, 161 U. S., 355;
Board of Trade v. Elevator Co., 198 U. S. 424.

As heretofore stated the amended certificate of the Circuit Court shows on its face that the judgment below was upon a question other than that of the jurisdiction of the Court.

IV.

Upon the grounds above argued, it should be held that no question of jurisdiction is before this Court under any of the classes mentioned in Section 5 of the Judiciary Act of March 3, 1891, and the writ of error should, therefore, be dismissed.

Respectfully submitted,

WELLS H. BLODGETT,
F. D. McKENNEY,
Counsel for Wabash Railroad Company.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

ELBEE PATCH, ADMINISTRATOR *De Bonis Non* OF THE ESTATE OF CHARLES W. MAXON, DECEASED, *Plaintiff in Error*,

vs.

THE WABASH RAILROAD COMPANY, *Defendant in Error.*

No. 57

STATEMENT.

A full and complete statement of this case was made in the brief of the defendant in error on its motion to dismiss the writ of error for want of jurisdiction, which statement, for the convenience of the court, is set forth herein as follows:

This is an action for damages for the death of Charles W. Maxon, while in the employ of defendant in error, as a locomotive engineer, on or about September 6th, 1904, near Marley, in the state of Illinois.

Plaintiff in error instituted this action August 14th, 1905, in the Circuit Court of Sangamon county, state of

Illinois, as the administrator *de bonis non* of the estate of Charles W. Maxon, alleging damage to "said plaintiff, as administrator *de bonis non*" in the sum of ten thousand dollars, etc.

The declaration also states that "plaintiff brings into court here the letters of administration *de bonis non* to him granted by the probate court of Cook county, Illinois, which gives sufficient evidence to the court here of the grant of administration *de bonis non* of said estate to said plaintiff (Record, p. 15).

On the 6th day of September, 1905, defendant in error filed its petition and bond for the removal of said cause to the United States circuit court for the Southern District of Illinois, and therein averred that it was at the time of the commencement of said suit, and still is, a corporation created and organized by and under the laws of the State of Ohio, and was at the time of the commencement of said suit, and still is, a citizen of said state of Ohio, and was at the time and commencement of said suit, and still is, a non-resident of the state of Illinois, and that said plaintiff was at the time of the commencement of said suit, and still is, a citizen and resident of the state of Illinois.

Thereafter, on the 18th day of September, 1905, said circuit court of Sangamon county, granted the prayer of said petition and ordered said cause removed to the United States Circuit Court as prayed (Record, p. 18).

Thereafter, the following proceedings in said cause were had in the said circuit court of the United States:

On the 30th day of December, 1905, plaintiff in error filed his plea in abatement to the petition for removal of defendant in error, which said plea (omitting caption) is in words and figures as follows, to-wit:

> "And the said plaintiff, Elbee Patch, administrator *de bonis non* of the estate of Charles W. Maxon, deceased, in his own proper person comes and defends

against said defendant's petition for removal of this action from the circuit court of Sangamon county, Illinois, to this court; and says, that before and at the time of the commencement of this action said defendant was a railroad corporation, created under and by virtue of the laws of the states of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other railroad corporations; and, that one of said other corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the state of Illinois, one was a corporation created, organized and existing under and by virtue of the laws of the state of Missouri; one was a corporation created, organized and existing under and by virtue of the laws of the state of Indiana; one was a corporation created, organized and existing under and by virtue of the laws of the state of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the state of Ohio; that said consolidation was effected and said defendant corporation was organized, and before and at the time of the commencement of this action, existed, under and by virtue of the laws of the state of Illinois and the laws of each of said four other states; and, that before and at the time of the commencement of this action, said defendant was, and still is, a citizen of, and resident in, the state of Illinois, and each of said four other states; and, *that before and at the time of the commencement of this action, this plaintiff was, and still is, a citizen of the state of Ohio;* and this he is ready to verify; wherefore he prays judgment whether this court will or can take cognizance of this action.

ELBEE PATCH,

Administrator *de bonis non* of the estate of Charles W. Maxon, deceased, plaintiff.

(Record, p. 20.)

GEORGE C. OTTO.

Attorney for Plaintiff.

State of Ohio, }
County of Fayette. } ss.

Elbee Patch, being first duly sworn, deposes and says, that the foregoing plea by him subscribed as administrator *de bonis non* of the estate of Charles W. Maxon, deceased, is true, in substance and in fact; and further deponent saith not.

ELBEE PATCH.

Subscribed and sworn to before me, a notary public, in and for the county and state aforesaid, this 27th day of December, A. D. 1905.

[SEAL] H. W. JONES,
Notary Public.

My commission expires October 20th, 1907.

On the 8th day of January, 1906, defendant in error filed in said court, its plea in said case. (Record, p. 21).

Defendant in error was ruled to reply to plaintiff's plea in abatement, and did thereafter, on to-wit, the 6th day of February, 1906, file in said court its general and special demurrer to said plea of plaintiff in abatement of defendant's petition for the removal of said cause, which said demurrers (omitting caption) are in words and figures as follows, to-wit:

"And the defendant by McAnulty and Allen, its attorneys, says that the plea of the plaintiff to the defendant's petition for the removal of this cause to the Circuit Court of the United States for the Southern District of Illinois and the matters therein contained in manner and form as the same are above pleaded are not sufficient in law to be replied unto and that it, the defendant, is not bound by law to answer the same; and this it is ready to verify; wherefore for want of a sufficient plea in this behalf the defendant prays judgment, etc.

McANULTY & ALLEN,
Attorneys for Defendant.

And for special cause of demurrer the defendant shows unto the court here the following causes, to-wit, for that said plea is not responsive to the averments contained in the defendant's petition for removal and neither traverses nor confesses and avoids the same, and for that said plea contains allegations wholly foreign to the issue tendered by said petition for removal and not responsive thereto, said allegations being as follows:

'That before and at the time of the commencement of this action said defendant was a railroad corporation, created under and by virtue of the laws of the states of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other railroad corporations; and, that one of said corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the state of Illinois, one was a corporation created, organized and existing under and by virtue of the laws of the state of Missouri, one was a corporation created, organized and existing under and by virtue of the laws of the state of Indiana, one was a corporation created, organized and existing under and by virtue of the laws of the state of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the state of Ohio; that said consolidation was effected and said defendant corporation was organized, and before and at the time of the commencement of this action, existed, under and by virtue of the laws of the state of Illinois, and the laws of each of said four other states; and, that before and at the time of the commencement of this action, said defendant was, and still is, a citizen of, and resident in, the state of Illinois, and each of said four other states.' And for that said plea is in other respects both in form and substance, uncertain, informal and insufficient, etc.

McANULTY & ALLEN,

(Record, p. 22) *Attorneys for Defendant.*"

On the 19th day of May, 1906, the court below sustained the demurrer of defendant in error to plaintiff's said plea in

abatement, to which ruling of the court the plaintiff did then and there except, and did elect to stand by his plea. Thereupon the court entered judgment against the plaintiff and in favor of the defendant, to which entry of judgment plaintiff then and there excepted. (Record, p. 23).

On the 31st day of May, 1906, plaintiff in error filed his petition for a writ of error to this court, praying, also that the court below certify to this court, conformable to the Act of Congress of March 3rd, 1891, Chapter 517, the question of jurisdiction of the court. (Record, p. 24).

Plaintiff in error, on the date last aforesaid, filed his assignment of error and bond, and on the first day of June, 1906, a day in the June term of said court, the writ of error was duly allowed. (Record, p. 1). On the same day of said term the court below issued a certificate as prayed by plaintiff in error, which certificate (omitting caption) is in words and figures as follows:

"CERTIFICATE.

In this cause, I hereby certify that the judgment herein rendered is based solely on the ground that the record, in my opinion, shows that the controversy involved is one between citizens of different states, and that the defendant is not a citizen of, or resident in, the state of Illinois where the suit was brought; that no other ground of jurisdiction appears, and jurisdiction was retained only for the reasons above stated.

This certificate is made conformable to the Act of Congress of March 3rd, 1891, Chapter 517.

Dated this 1st day of June, A. D. 1906.

HUMPHREY,

(Record, p. 26). *United States District Judge.*"

Afterwards, on the 9th day of June, 1906, a day in said June term, the defendant in error filed in the court below its motion, on due notice, for an order rescinding and annulling the certificate aforesaid, or for such other order by

way of amendment or otherwise, as the court shall deem meet, so that the records of the proceedings in the cause shall truly set forth the fact with respect to the questions actually determined by the court.

And in support of said motion the defendant shows to the court:

"1. That said certificate was inadvertently and improvidently executed and was obtained upon the last (first) day of June term, 1906, of this court without knowledge of or notice to the defendant or its attorneys.

2. That the question of jurisdiction by reason of diversity of citizenship between plaintiff and defendant was not in fact determined in this action nor was jurisdiction thereof reserved as recited in this certificate by reason of such diversity of citizenship.

3. That the only question determined was the insufficiency of the plaintiff's plea in abatement.

4. That the defendant's demurrer to said plea of abatement was not in fact sustained upon the ground of diversity of citizenship of the parties from the averments of the pleadings, but upon entirely different grounds, to-wit:

The lack of status in the plaintiff as a citizen of Ohio and non-resident of Illinois to act as administrator under the statutes of Illinois in bringing and maintaining this action and filing said plea and upon other ground not involving the question of diversity of citizenship.

McANULTY & ALLEN,

(Record, p. 27). *Attorneys for Defendant.*"

Thereafter, on the 13th day of June, 1906, a day in the said June term, the court below sustained the aforesaid motion of defendant in error, and by proper order, amended the certificate of the court theretofore issued on the first day of June, 1906, which amended certificate of said court (omitting caption) is in words and figures as follows, to-wit:

"TRESPASS.

This cause came on to be heard on motion of the defendant for an order annulling or amending a certain certificate as to jurisdiction, dated the 31st day of May, 1906, and the court having heard the argument of counsel for defendant in support of said motion and of counsel for plaintiff in opposition thereto, upon examination of said certificate, finds the same was inadvertently signed under a mistake as to the nature and contents thereof and that the matters determined by the court are not correctly set forth therein.

It is therefore ordered by the court that said certificate be amended so as to read as follows: 'In this cause I hereby certify that this action was brought in the circuit court of the county of Sangamon, state of Illinois, and was afterwards removed to this court by the defendant upon its petition for removal based solely upon the ground of diverse citizenship between the parties wherein it stated among other things that it, the defendant, was a corporation organized under the laws of the state of Ohio, and a citizen of said state of Ohio and a non-resident of the state of Illinois, and that the plaintiff was a citizen of the state of Illinois; that after said cause was removed to this court the plaintiff filed a plea in abatement to the jurisdiction of the court, alleging amongst other things that the plaintiff was a citizen of the state of Ohio; that the defendant demurred generally and specially to said plea, that said demurrer was argued by counsel for the parties and the demurrer sustained, the court being of opinion that said plea *was defective in that from the averment therein that the plaintiff was a citizen of the state of Ohio it followed as a necessary inference that his legal residence was also in the state of Ohio, and* hence that he was a non-resident of the state of Illinois *and therefore deprived of any status to maintain this action or to file said plea under the statute of the state of Illinois prohibiting a non-resident of said state*

from acting as administrator therein; that upon said demurrer having been sustained the plaintiff elected to stand by his plea and judgment was thereupon rendered in favor of the defendant and against the plaintiff for costs; that said cause was pending in this court solely upon the ground of alleged diversity of citizenship between the plaintiff and defendant but that the question of jurisdiction was not passed upon by the court.

To the entry of this order the plaintiff excepts." (Record, p. 28).

The final proviso of Section 18 of Chapter 3 of the statutes of Illinois, entitled "Administration" (4 Starr & Curtiss Statutes, p. 32), as amended by the Act of 1897 (Laws of Illinois, 1897, p —) provided that "no non-resident shall be appointed *or act* as executor."

In 1905 this section was amended by an Act of the Illinois Legislature, entitled "An act to amend Section 18 of an act entitled 'An act in regard to the administration of estates,' approved April 1st, 1872, in force July 1st, 1872" (Laws of Illinois, 1905, p. 2), so as to read as follows:

AN ACT ENTITLED "AN ACT TO AMEND SECTION 18 OF AN ACT ENTITLED 'AN ACT IN REGARD TO THE ADMINISTRATION OF ESTATES,' APPROVED APRIL 1, 1872, IN FORCE JULY 1, 1872.

Section 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS REPRESENTED IN THE GENERAL ASSEMBLY: That Section 18 of an act entitled "An act in regard to the administration of estates," approved April 1, 1872, and in force July 1, 1872, and acts amendatory thereof, be and the same is hereby amended to read as follows:

18. Administration of the estate of all persons dying intestate shall be granted to some one or more of the per-

sons hereinafter mentioned and they are respectively entitled to preference thereto in the following order:

1. To the surviving husband or wife, or any competent person nominated by him or her.
2. To the children of any competent person nominated by them.
3. To the father or any competent person nominated by him.
4. To the mother or any competent person nominated by her.
5. To the brothers or any competent person nominated by them.
6. To the sisters or any competent person nominated by them.
7. To the grandchildren or any competent person nominated by them.
8. To the next of kin or any competent person nominated by them.
9. To the public administrator or to any creditor who shall apply for the same.

PROVIDED, that only such persons as are entitled to administer under this act shall have the right to nominate. When several are claiming and are equally entitled to administration the court may grant letters to one or more of them, preferring relatives of the whole to those of half blood. Preference and the right to nominate under this act must be exercised within sixty days from the death of the intestate, at the expiration of which time administration shall be granted to the public administrator.

In all cases where the intestate is a non-resident, and in all cases where there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, who at the time of the death of said decedent is a *bona fide* resident of this state, administration shall be granted to the public administrator; and in all cases where any contest

shall arise between the widow, heirs at law or next of kin of the decedent in relation to the grant of letters, and it shall appear to the court that the estate of said decedent is liable to waste, loss or embezzlement, administration to collect shall be granted to the public administrator of the proper county to administer such estate until said contest is determined. No administration shall in any case be granted until satisfactory proof shall be made to the county court to whom application for that purpose is made that the person in whose estate letters of administration are requested is dead and died intestate: PROVIDED, that when the heirs are residents of this state and the estate is solvent and without minor heirs and it is desired by the parties in interest to settle the estate without administration this law shall not apply: AND FURTHER PROVIDED, that no non-resident of this state shall be appointed or act as administrator or executor.

Approved May 12, 1905.

By this amendatory act the final proviso of said Section 18 was changed by adding the word "administrator" thereto, so that said section, in force prior to the date this action was filed, provided "that no non-resident of this state shall be appointed *or act* as administrator or executor."

The case is now here on writ of error granted conformable to the act of March 3rd, 1891, Section 5.

The questions upon the merits in this case as raised by the record herein, will be discussed under the following heads:

I.

For the purposes of jurisdiction of the courts of the United States, domicile is the test of citizenship; and in a

jurisdictional sense the words "citizen" and "domicile" are synonymous.

Poppenhauser vs. Comb Co., 14 Fed. 707;
McDonald vs. Flour Mill Co., 31 Fed. 577;
Collins vs. City of Ashland, 112 Fed. 175;
Morris vs. Gilmer, 129 U. S. 315;
Anderson vs. Watts, 138 U. S. 694;
Sun Printing and Publishing Company vs. Edwards, 194 U. S. 377.

II.

The word "resident" as used in the last proviso to Section 18, Chap. 3, of the Administration Statutes of Illinois as amended by the Act of 1905 (Laws of Illinois, 1905, page 2) is synonymous with domicile.

In re Mulford, 217 Ill. 242;
McDaniel vs. King, 5 Cush. 469;
Strongton vs. Cambridge, 165 Mass. 251;
Oliviere vs. Atkinson, 168 Mass. 28;
Harmon vs. Grizard, 89 North Car. 115;
Ryall vs. Kennedy, 67 N. Y. 379.

III.

The allegation of plaintiff in error in his plea in abatement to the defendant's removal petition, that "before and at the time of the commencement of this action this plaintiff was and still is a citizen of Ohio," is equivalent, in legal effect to an allegation that the domicile of plaintiff was at the time in the state of Ohio, and hence that he was at the time a non-resident of Illinois.

IV.

No question of collateral attack on the judgment of the Probate Court of Cook county, Illinois, appointing plaintiff in error administrator de bonis non of the estate of Charles W. Maxon, deceased, properly arises on this record. The sole question at issue is whether the plaintiff in error by his allegation of his citizenship in Ohio, affirmatively showed on the face of the record, his want of legal capacity to institute this suit or file any plea herein, under the prohibitions of Section 18, Chap. 3, of the Administration Statutes of Illinois, as amended by the Act of 1905, which provides "that no non-resident of this state shall be appointed or act as administrator or executor."

V.

Plaintiff's plea in abatement to defendant's removal petition is insufficient.

ARGUMENT.

I.

For the purposes of jurisdiction of the courts of the United States, domicile is the test of citizenship, and in a jurisdictional sense the words "citizen" and "domicile" are synonymous.

It has been uniformly ruled by the courts of the United States that under the judiciary act, the domicile of the parties litigant was the test of citizenship, in the determination of questions affecting the jurisdiction of the Federal Courts on the ground of diversity of citizenship.

In the case of Poppenhauser vs. Comb Co., 14 Fed. 707, Judge Wallace said:

> "The plaintiff, by virtue of her husband's naturalization, may not be an alien, and may be entitled to all the privileges of citizenship, but the question is whether she was a resident of this state when the action was brought. Conceding that she was not an alien, if she was not a resident of the state the suit was properly removed. Her position is no better than that of a native born citizen who may have changed his domicile. For the purposes of the jurisdiction of the courts of the United States, domicile is the test of citizenship. A person may be a resident alien, but cannot be a citizen of the state when he has abandoned his domicile there."

In Collins vs. City of Ashland, 112 Fed. 175 (l. c. 178) it was said:

> "The burden of showing that plaintiff's domicile and consequent citizenship was in Kentucky, and not in Ohio, as alleged in the petition, was on the defendant. In the case of Association vs. Sparks, 28 C. C. A. 399, 83 Fed. 225, Riner, J., said:
>
> 'It is the well settled rule in the Federal Courts, that when the plaintiff's petition, as in this case, sets out

the necessary diverse citizenship of the parties, the burden of both allegation and proof rests upon the party who seeks to defeat it.'

But though the ultimate fact to be determined is domicile and consequent citizenship, and not residence, yet the latter fact is evidential of the former. It is *prima facie* evidence of it, and nothing else appearing, shifts the burden of evidence to the plaintiff.

In the case of Anderson vs. Watts, 138 U. S. 694, Mr. Chief Justice Fuller said:

'The place where a person lives is taken to be his domicile until facts adduced establish the contrary.'

And in the case of McDonald vs. Flour Mill Co., *supra*, Deady, J., said:

'And while residence as a fact is *prima facie* evidence of citizenship, it is not conclusive of the question.'

The burden of evidence was therefore on the plaintiff to show that his domicile and consequent citizenship was not the same as his residence at the time suit was brought."

In Sun Printing and Publishing Company vs. Edwards, 194 U. S. 377, the record shows that Edwards was domiciled in the state of Delaware, while the defendant Publishing Company was a corporation of the state of New York. Upon the question of the citizenship of Edwards, Mr. Justice White says (l. c. 383):

"Now it is elementary that to effect a change of one's legal domicile, two things are indispensable: First, residence in the new domicile; and second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. Mitchell vs. United States, 21 Wall. 350.

As Delaware must, then, be held to have been the legal domicile of Edwards at the time he commenced this action, had it appeared that he was a citizen of

> the United States, it would have resulted by operation of the 14th amendment, that Edwards was also a citizen of the state of Delaware. Anderson vs. Watts, 138 U. S. 694. Be this as it may, however, Delaware being the legal domicile of Edwards, it was impossible for him to have been a citizen of another state, district or territory; and he must then have been either a citizen of Delaware or a citizen or subject of a foreign state. In either of these contingencies, the circuit court would have had jurisdiction over the controversy."

The plaintiff in error, in his plea in abatement to the removal petition of the defendant in error, alleged "that before and at the time of the commencement of this action this plaintiff was and still is a citizen of the state of Ohio." (Record, page 20). This is a jurisdictional plea, and plaintiff in his allegation of citizenship must be held to have used the word "citizen" in a jurisdictional sense, and to have imported to that term the construction as given by the courts of the United States, and the allegation of citizenship in Ohio is, under the authority of the above cases, equivalent in legal effect to an allegation that, at the time, plaintiff was domiciled in the state of Ohio.

II. AND III.

The word resident as used in the last proviso to Section 18, Chap. 3, of the Administration Statutes of Illinois, as amended by the Act of 1905 (laws of Illinois, 1905, page 2) is synonymous with domicile.

It has been said that domicile and residence are not synonymous, for the reason that a person may have more than one residence, but cannot, as a general rule, have two domiciles. But while this distinction undoubtedly exists, and has been often recognized, the courts in construing constitutional and legislative enactments have frequently held that these terms were used as synonymous. This is

generally true in the laws relating to taxation, voting, settlements and administration.

In McDaniel vs. King (5 Cush. 469) it was held that residence and domicile were used as synonymous under the Insolvency Statutes of Massachusetts, and Oliviere vs. Atkinson, 168 Mass. 28, held that the word residence in the public statutes, c. 157, sec. 81, providing for the discharging of the insolvent from debts "due to any person resident therein" (that is in Massachusetts) at the time of the first publication of the notice of the issuing of the warrant, was equivalent to domicile.

And in Strongton vs. Cambridge, 165 Mass., it was said:

> "The word residence is used in different senses. Generally in the laws relating to taxation, voting and settlement, it means the same as domicile."

The meaning of the word residence as used in the last proviso to Section 18, Chap. 3 of the Administration Statutes of Illinois, as amended by the Act of 1905 (Laws of Illinois, 1905, page 2) has been settled by an authoritative decision of the Supreme Court of Illinois. Prior to the amendment of 1905, the final proviso of Section 18 read as follows:

> "And provided further that no non-resident of this state shall be appointed administrator, and no non-resident shall be appointed or act as executor." (Laws of Illinois, 1897, page 1).

In the case In re Mulford, 217 Ill., 242, it was made known to the probate court that the petitioner was a resident of the state of Ohio, and the court thereupon refused to grant letters testamentary to him for the reason he was a non-resident of Illinois. The supreme court of that state in its opinion in that case, said (l. c. 249):

> "The petitioner, Marion Mulford, testified that he was 71 years old, and had a wife and two daughters

with whom he resided in Dayton, Ohio, when the said Harriet M. Richards died; that he lived with his family on homestead property owned by himself, and which he had not abandoned; that he had come to Illinois with the fixed purpose and intention of accepting the executorship of this estate and of remaining within the jurisdiction of the court until the estate could be administered upon in accordance with the will, and that he still retained that fixed purpose whatever time might be required therefor. Nevertheless the appellant is a resident of the state of Ohio. Residence is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning. (24 Am. & Eng. Enc. of Law, 2nd Ed. 697). 'A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's former inhabitance, does not constitute residence.'" Pells vs. Snell, 130 Ill. 379.

It is the well settled rule that where in a case before this court, the construction of a state statute is involved, and it is found that the highest court of that state has given a construction to the particular statute, the construction so given will be followed by this court; and the Supreme Court of Illinois having declared that the word residence as used in the above mentioned proviso means domicile, and the plaintiff in error having in his plea in abatement made the jurisdictional allegation that at the time he was a citizen of Ohio, with his domicile in Ohio, then it follows that he was at the time a non-resident of the state of Illinois, and consequently disqualified for appointment, and prohibited from acting as administrator under the plain provisions of the statute above referred to.

IV.

No question of collateral attack on the judgment of the Probate Court of Cook county, Illinois, appointing plaintiff in error administrator de bonis non of the estate of Charles

W. Maxon, deceased, properly arises on this record. The sole question here at issue is whether the plaintiff in error by his allegation of his citizenship in Ohio affirmatively showed on the face of the record his want of legal capacity to institute this suit, or file any plea herein, under the prohibitions of Section 18, Chap. 3, of the Administration Statutes of Illinois, as amended by the act of 1905, which provides "that no non-resident of this state shall be appointed or act as administrator or executor."

(*a*) The position assumed by the defendant in error, having reference to the disability on this record of plaintiff to maintain this action or file any plea herein, does not involve a question of collateral attack upon the judgment of the Probate Court of Cook county, Illinois, in appointing plaintiff as the administrator *de bonis non* of the estate of Charles W. Maxon, deceased. The question here presented was the chief point of contention in the court below. Counsel for plaintiff (plaintiff in error) very strenuously contended that the attempt of defendant to take advantage of the disqualification, to act, of the plaintiff administrator, when it appeared for the first time on the record by his allegation of citizenship in the state of Ohio in his plea in abatement, filed herein, was a collateral attack on the judgment of appointment of plaintiff as administrator *de bonis non* by the Probate Court of Cook county, Illinois.

The contention of defendant below, as is its contention here, was that by plaintiff's allegation in his plea that before and at the time of the commencement of this action plaintiff was and still is a citizen of the state of Ohio, he thereby disclosed for the first time on the record his disqualification for appointment, as well as his disqualification to act as administrator under the statutes of Illinois then in force.

That this is true appears to be manifest from a brief consideration of the subject.

The prohibitions of the Illinois statutes are two: First, that no non-resident of Illinois can be appointed administrator or executor; and second, that no non-resident of that state shall act as administrator or executor. (Laws of Illinois, 1905, page 2, Hurd's Statutes 1906, page 107-8).

That it was the clear intention of the legislature of Illinois to make this two-fold qualification as to non-residence in the administration of estates in that commonwealth, seems clear from the history of the statute. Prior to the Administration Act of 1872, there was no express prohibition against the appointment of non-residents as administrators. The statute of 1847, however, provided that when any executor or administrator may have removed without the limits of the state, it thereupon became the duty of the probate justice of the proper county to revoke the letters of any such executor or administrator, in the manner as therein provided. (Scates Comp. 1238). It was under this statute that the Supreme Court of Illinois, in 1866, in the case of Childs vs. Gratiot (41 Ill. 357) held that the provisions of the statute of 1847 impliedly prohibited the appointment of a non-resident administrator in that state, and in the course of the opinion, Mr. Justice Breese said (l. c. 359):

> "The spirit of this law would seem to forbid the appointment of a non-resident to any such trust. For if he can be deprived of his office on his removal to another jurisdiction, no court would be warranted in appointing him to the office, he being a non-resident at the time of his appointment. There is an incongruity in it which cannot be reconciled. We therefore are of the opinion that on the facts before the circuit court, the appointment of Mr. Gratiot, he being a non-resident, should have been revoked on the application of the administrator who had been appointed such by the court of the domicile of the intestate."

The general administration Act of Illinois was enacted in 1872 (Laws of Illinois, 1872, page 77) and Section 18 of the Act in the final proviso thereof, provided:

> "And provided further that no non-resident of this state shall be appointed administrator or allowed to act as such"

Here we find the first express declaration of the statute disqualifying a non-resident from *acting* as administrator. This doubtless arose from the fact that the appellate courts of Illinois, following the general rule in such case, held that although the person appointed administrator was in fact disqualified for appointment under the law, yet he was by virtue of the judgment of appointment at least a *de facto* officer. Hence the express prohibition of this statute that no non-resident shall be allowed to act as an administrator. The language of that final proviso was carried in Section 18 until the amendment of 1897 (Laws of Illinois, 1897, pages 1 and 2) where it was changed so as to read:

> "Provided further, that no non-resident of this state shall be appointed administrator, and no non-resident shall be appointed or act as executor."

It is to be observed that by this amendment the prohibition to non-residents *acting* is applied only to executors, and it was under this proviso that the case of In re Mulford, *supra*, was decided by the Supreme Court of Illinois in 1905. In the meantime, however, Section 18 was again amended by the Act of 1905, and the final proviso was here changed so as to read:

> "And provided further that no non-resident of this state shall be appointed or act as administrator or executor." (Laws of Illinois, 1905, page 3).

By this amendment in force when this section was instituted, the prohibition to a non-resident to *act*, was expressly applied to both administrators and executors.

The general demurrer of defendant in error to the plea in abatement directly put in issue the question of the disqualification of plaintiff to act as administrator. It was there assurted by defendant in error that the plea was defective, in that from the allegation therein that at the time of the commencement of this action, plaintiff was and still is a citizen of the state of Ohio, it followed by legal intendment that his domicile or legal residence was in that state, and that hence he was deprived of any status to maintain this action, or file any plea herein by force of the Illinois statute above referred to. This was the view taken by the learned trial judge, for in his amended certificate herein (Record, page 28) he says:

> "In this cause I hereby certify that this action was brought in the Circuit Court of the county of Sangamon, state of Illinois, and was afterwards removed to this court by the defendant upon its petition for removal based solely upon the grounds of diverse citizenship between the parties, wherein it stated, among other things, that it, the defendant, was a corporation organized under the laws of the state of Ohio, and a citizen of said state of Ohio, and a non-resident of the state of Illinois, and that the plaintiff was a citizen of the state of Illinois; that after said cause was removed to this court the plaintiff filed a plea in abatement to the jurisdiction of the court, alleging amongst other things, that the plaintiff was a citizen of the state of Ohio; that the defendant demurred generally and specially to said plea; that said demurrer was argued by counsel for the parties and the demurrer sustained, the court being of the opinion that said plea was defective in that from the averment therein that the plaintiff was a citizen of the state of Ohio it followed as a necessary inference that his legal residence was also in the state of Ohio,

> and hence that he was a non-resident of the state of Illinois, and therefore deprived of any status to maintain this action or to file said plea under the statute of the state of Illinois prohibiting a non-resident of said state from acting as administrator therein."

The views here expressed do not even tend to question the judgment of the Probate Court of Cook county appointing plaintiff administrator *de bonis non*. The judgment of that court in making the appointment of a non-resident administrator is not in any way involved. Defendant asserted by its demurrer that, it appeared by the record in this cause that a non-resident of Illinois was attempting to act as administrator by the bringing of this suit, and by the filing of this plea, and that, in virtue of the statute of Illinois then in force, plaintiff has no standing as plaintiff administrator, in any suit arising from the administration of the estate of the intestate, and the plea in abatement to the jurisdiction, instead of showing that the defendant improperly removed the case into the Federal Court, disclosed that the plaintiff administrator had no right to bring or maintain the action, or file the plea in question.

A similar case arose in the case of Insurance Compaany vs. Lewis, 97 U. S. 682. That action was commenced in the Circuit Court of St. Louis county, Missouri, by Lewis as public administrator of that county, upon a policy of insurance whereby the insurance company agreed to insure the life of William S. Berton, of Milwaukee, county of Milwaukee, state of Wisconsin. The question on writ of error was as to the right of the defendant in error, (plaintiff below,) as public administrator of St. Louis county, Missouri, to maintain any action upon the policy, and it was there contended by counsel for the administrator that such question could not be raised in this proceeding, for the reason that it amounted to a collateral attack upon the judgment of appointment of the ad-

ministrator. But Mr. Justice Harlan disposes of the case, after a review of a number of cases cited in support of the contention of the administrator, in the following language:

> "These decisions, it is obvious, have no application to the subject under consideration. They announce no principle in conflict with those here declared. The company does not ask the revocation of Lewis' letters of administration. Its answer does not dispute the validity of his appointment as public administrator of St. Louis county. Recognizing his right to perform all the functions which by the laws of Missouri pertain to that office, the company in view of the facts we have stated, simply denies that Lewis had any authority under the statutes of that state, or by virtue of his appointment as such administrator, to take charge of the particular estate in question, or assert any claim arising out of the alleged contract of insurance. If the mere assumption of Lewis to authority to that extent was sufficient *prima facie* to maintain this action—a proposition which it is unnecessary to discuss—the conceded and established facts show an entire absence of any such authority and prove that the company was not bound to litigate with him in any court whatever its liability upon the policy sued on."

So in this case, defendant in error does not dispute the validity of plaintiff's appointment as administrator, but does show that notwithstanding such appointment, he has not, under the prohibitions of the Illinois statute, any authority to act as an administrator, and that his disqualification in that regard may be taken advantage of during the course of any proceeding, when it is made apparent by the record that he is so disqualified. This position presumes no illegality as to his appointment, but rather assumes that unless the question of his authority to act is properly raised at the time when his disqualification ap-

pears on the record, then all acts done by him as administrator of the estate of the intestate would at least be the acts of an administrator *de facto*, and as such, valid. (b) It is contended by counsel for plaintiff in error that no such questions as are here discussed properly arise in this court, but it is submitted that these questions do very properly arise on this record, for the reason that from their consideration, we will be able to determine whether the judgment of the trial court was based upon the single question of its jurisdiction as a Federal Court to hear and determine this particular cause of action, or whether the judgment of that court upon the demurrers to the plea was the exercise of "its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other." Louisville Trust Co. vs. Knott, 191 U. S. 225.

Whatever view this court may take of the authority of the trial court to grant the amended certificate, the fact will remain that such amended certificate is a part of the record in this case, and may at least be considered as the opinion of the learned trial judge on the questions raised below on defendant's demurrers to the plea, and the grounds of such decision, and as such may very properly be referred to by this court. (Courtney vs. Pradt, 196 U. S., l. c. 91).

It also appears by the record that the defendant in error demurred generally and specially to plaintiff's plea in abatement. (Record, p. 22). The decision of the trial court was that

> "This day come again the parties by their attorneys, and the court being now fully advised, sustains the demurrer of the defendant to plaintiff's plea in abatement to the jurisdiction of this court," etc. (Record, p. 23).

Now the causes for special demurrer were (1) that said plea is not responsive to the averments contained in defendant's petition for removal, and neither traverses nor confesses and avoids the same; and (2) that said plea contains allegations wholly foreign to the issue tendered by said petition for removal, and not responsive thereto.

Counsel for plaintiff in error devotes the chief part of his brief to a discussion of the very questions raised by this special demurrer (Brief, plaintiff in error, pp. 17-35), namely, whether the plea in abatement filed by the plaintiff properly raised the question of the jurisdiction of the trial court as a Federal Court, and counsel relies for the justification of his position on this phase of the question, upon the case of Johnson vs. Insurance Co. (35 Fed. 374), while the contra-theory is followed in McDonald vs. Flour Mill Co., 31 Fed. 579; Curnow vs. Ins. Co., 44 Fed. 305; Foster on Federal Procedure, 3 Ed. 964. We are not now concerned with the respective merits of these opposite views, as to whether plaintiff's plea was subject to objections expressly raised by defendant's special demurrer. It is deemed sufficient for present purposes, to point out to this court that this special demurrer raised a question of pleading rather than a question of the jurisdiction of the Federal Court to hear and determine the cause; and the decision of the court below, sustaining the defendant's demurrer (if we ignore the court's amended certificate) raises a question determinable by appeal, and not by writ of error from this court, under the act of March 3rd, 1891, Chap. 517, Sec. 5.

It would seem, therefore, that this case fairly comes within the rule laid down by this court in Courtney vs. Pradt, 196 U. S. 89, where it was said:

> "The appeal was taken directly to this court, and cannot now be maintained, unless the case comes within the first of the classes named in Section 5 of the

Judiciary Act of March 3rd, 1891, which gives an appeal or writ of error direct 'in any case in which the jurisdiction of the court is in issue; in such cases the question of the jurisdiction alone shall be certified to the supreme court from the court below for decision.'

It is well settled that the question of jurisdiction thus to be certified is the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal. Blythe vs. Hinckley, 173 U. S. 501; Mexican Central Ry. Co. vs. Eckman, 187 U. S. 429; Louisville Trust Co. vs. Knott, 191 U. S. 225; Bache vs. Hunt, 193 U. S. 523. * * *

But, as said by Mr. Justice Gray in Huntington vs. Laidley, 'the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction,' that is of the jurisdiction of the court as a court of the United States.

No such state of record is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the circuit court as a Federal Court is presented.

The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject matter in the state courts, or the sufficiency of the service of mesne process to authorize the recovery of personal judgment. * * * It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the Federal Courts as contradistinguished from the state courts. It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the

motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of Section 5."

Defendant in error maintains that the circuit court was not bound to remand this cause to the state court, so that that court might determine the status of plaintiff as administrator to maintain this action, or file the said plea. Neither was it necessary for the court below to determine its jurisdiction as a Federal Court, in order that it might render its judgment upon the sufficiency of plaintiff's plea. And the record herein clearly shows that upon these two questions duly presented by the record, the court below determined by its decision on defendant's demurrers to plaintiff's plea, and from which it necessarily follows that "no single and definite issue as to the jurisdiction of the circuit court as a Federal Court is presented."

V.

Plaintiff's plea in abatement to defendant's removal petition is insufficient in that it is not responsive to the averments contained in defendant's petition for removal.

It is a well settled rule in the Federal Courts that where the removal petition sets out the necessary adverse citizenship of the parties, the burden of both allegation and proof rests upon the party who seeks to defeat it.

The averment of defendant in its petition for removal is as follows:

"Your petitioner further shows that said suit is of a civil nature, and is a controversy wholly between citizens of different states, to-wit, between this petitioner, who avers that it was at the time of the commencement of said suit, and still is, a corporation created and organized by and under the laws of the state of Ohio, and was at the time of the commencement of said suit, and still is, a citizen of said state of Ohio, and was at the time of the commencement of

said suit, and still is, a non-resident of the state of Illinois, and the said plaintiff, who was at the time of the commencement of said suit and still is a citizen and resident of the state of Illinois."

The plaintiff meets the foregoing allegation of citizenship of the defendant corporation by its plea:

"That before and at the time of the commencement of said action said defendant was a railroad corporation created under and by virtue of the laws of the states of Illinois, Missouri, Indiana, Michigan and Ohio, by the consolidation of five other railroad corporations, and that one of said other corporations so consolidated was a corporation created, organized and existing under and by virtue of the laws of the state of Illinois; one was a corporation created, organized and existing under and by virtue of the laws of the state of Missouri; one was a corporation created, organized and existing under and by virtue of the laws of the state of Indiana; one was a corporation created, organized and existing under and by virtue of the laws of the state of Michigan, and one was a corporation created, organized and existing under and by virtue of the laws of the state of Ohio; that said consolidation was effected, and said defendant corporation was organized, and before and at the time of the commencement of this action, existed under and by virtue of the laws of the state of Illinois, and the laws of each of said four other states, and that before and at the time of the commencement of this action said defendant was and still is a citizen of and resident in the state of Illinois, and each of said four other states."

It is contended by defendant in error that from the consolidation referred to in the foregoing plea, in the manner as therein stated, it does not follow as a matter of law that "before and at the time of the commencement of this action said defendant was and still is a citizen of and resident in the state of Illinois, and each of the said four

other states." In the determination of this question, it should be borne in mind that there are several ways of consolidating railroad companies, necessarily producing different results as regards citizenship. Speaking of the effect of consolidation, Mr. Noyes, in his work on Intercorporate Relations, Sec. 58, says:

> "As already shown, the term consolidation as used in statutes and charters, authorizing the union of corporations has acquired no well defined meaning, but is used to describe three forms of corporate conjunction: First, the dissolution of all the constituent corporations and the creation at the same instant in their stead of a new and distinct corporation, with franchises, privileges and property derived from those passing out of existence; second, the merging of one corporation in another, by which the former only is dissolved, and the latter continues its existence with the franchises, privileges and property of the merging corporation, added to its own; third, the continuance of all the consolidated corporations for all purposes, or for formal purposes connected with the winding up of their affairs."

The ultimate facts necessary to enable the court to determine whether the consolidation effected in accordance with the facts as pleaded, when admitted on demurrer, are not averred in the foregoing plea of the plaintiff in error.

The statutes of Illinois authorizing the consolidation of railroad corporations provides that:

> "it shall be lawful for the corporation so created in this state to consolidate its property, franchises and capital stock with the property, franchises and capital stock of the corporation or corporations of such other state or states in which the remainder of such railroad is situated, and upon such terms as may be agreed upon between the directors, and approved by the stockholders owning not less than two-thirds in amount of the capital stock of such corporations."

Manifestly under this statutory enactment the effect to be given to the consolidation must depend largely upon the terms of agreement entered into between the directors, and approved as required; and the terms of that agreement are the necessary ultimate facts to be pleaded, before it can be determined whether as a matter of law, the consolidation, completed according to the terms of that agreement, would constitute the consolidated corporation a citizen of, and resident in, the state of Illinois.

In Railway Co. vs. Ashling, 160 Ill., l. c. 382, it is said:

> "The general rule that the consolidation of two or more cororations into one creates a new company and works a dissolution of the original corporations forming the consolidated company is subject to exceptions, and depends upon the statute under which the consolidation is effected. In Central R. R., etc., vs. Georgia, 92 U. S. 665, it was said: 'It may be that the consolidation of the two corporations—or amalgamation as it is called in England—if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not, must depend upon the statute under which the consolidation takes place and of the intention therein manifested.' We see no reason why, under the statutes in question, one corporation may not be consolidated with another under the name of such other which is continued in existence with enlarged powers, franchises and property rights. It is in substance so provided, and such consolidations are frequently made."

In Meyer vs. Johnson, 64 Ala. 663, it was held that the words "consolidate" and "consolidation," as used in statutes authorizing and ratifying the union or combination of several railroad corporations into one, have not acquired a recognized judicial construction which imports that all the companies are dissolved and merged into one new company; on the contrary the terms are generally ap-

plicable to the union of two or more companies in such a way that one of them is continued in existence under a new name, and with enlarged powers, while the others are merged in and absorbed by it, and it was said in the course of the opinion in this case:

> "When the rights, franchises and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is, in law and according to the common understanding, a consolidation of such companies, whether such single corporation called the consolidated company, be a new one then created, or one of the original companies continuing in existence, with only larger rights, capacities and property."

In Tod vs. Union Land Company, 57 Federal 56, it was said:

> "The meaning to be attached to the term consolidation as used in a law authorizing the consolidation of two or more corporations, is uncertain. It depends not often upon the particular terms of the act giving the power, and the legal effect resulting from the consolidation will largely depend upon the character of the consolidation authorized by the permission, *as well as upon the contract actually entered into by the consolidating companies.* Generally, the merging of the two companies into a new and distinct corporation is contemplated, and is the legal result. Not infrequently the absorption of one corporation by the other is the consequence of consolidation."

In Shields vs. Ohio, 95 U. S. 319, certain railroad corporations of other states were consolidated with an Ohio corporation, in pursuance of a consolidation agreement, and it was held that the result was a new Ohio corporation. The court in that case said (l. c., 322):

"The legislature had provided for the consolidation. In each case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporation subsisted. All, the old and the new, could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolation. This being done *co instanti* the new corporation came into existence."

And further:

"When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were granted to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation."

The citizenship of the class of consolidated corporations, of which the case of Shields vs. Ohio, *supra*, furnishes an example, properly falls within the rule declared in O. & M. R. R. vs. Wheeler, 1 Black, 286, where it was said:

"Where a corporation is created by the laws of a state the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence, and that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no presumption or evidence to the contrary is admissible for the purpose of withdrawing such suit from the jurisdiction of the court of the United States, and that the law upon this subject must be regarded as settled."

On the other hand, the case of Muller vs. Dows, 94 U. S. 444, furnishes an example of a case where a corporation of Iowa and a corporation of Missouri were consolidated

as one, under the laws of the two states, without destroying the constituent members. And in Railway Co. vs. Whitton, 79 U. S. 271, the proof was that the defendant was a corporation created and existing under the laws of the states of Illinois, Wisconsin and Michigan, and the court found that the defendant railway company was a corporation created under the laws of Wisconsin, and it was held that in a suit against it in Wisconsin, it should be considered a citizen of that state.

The query here presented, is whether as between the different methods of consolidating corporations above mentioned, it can be determined from the facts stated in plaintiff's plea that the consolidated corporation therein referred to, is a citizen of and resident in the state of Illinois? From the foregoing cases it is shown that where the effect of the consolidation is to create a consolidated corporation as a new and distinct corporate entity, it is under the rule quoted from the Wheeler case, *supra*, a citizen of the state under whose laws such new corporation is created, and where the effect of the consolidation is a mere merger of one corporation into another, and the continuance in existence of the latter, as in the case of the purchase of the franchises, stock, etc., of one corporation by another, the citizenship of the grantee corporation is the citizenship of the consolidated company; and it is submitted that unless the fact of consolidation, as carried out in accordance with the terms of the consolidation agreement (which is not shown by this record), was stated in the plea in abatement, then this court cannot determine, as a matter of law, whether the consolidated corporation is within the first, second or third class of such consolidated corporations, as above defined, and for these reasons, it is further submitted that the special demurrer of defendant

in error, to the foregoing plea of plaintiff in error, was properly sustained, and the averment in said plea that "before and at the time of the commencement of this action defendant was and still is a citizen of, and resident in, the state of Illinois, and each of said four other states," is the statement of a mere legal conclusion.

It is, therefore, respectfully submitted that the judgment of the circuit court should be affirmed.

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